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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 542

AL MARSHALL, ET AL,

Petitioners

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, ET AL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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MISCELLANEOUS

28 U.S.C. 1254(1) 2

Railway Labor Act 2

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment in this case of the United States Court of Appeals for the Fifth Circuit.

Opinion Below

The opinion of the United States District Court for the Middle District of Georgia appears at pp. 610-628 of the

record and is reported at 174 F. Supp. 33. The judgment of the United States Court of Appeals for the Fifth Circuit, which is not reported, appears in Appendix A, *infra*, p. 19).

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 2, 1959 (opinion dated June 30). On July 28, 1959, that Court denied a timely petition for rehearing. The time for the filing of this petition was extended by an order of Mr. Justice Black to and including November 25, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Question Presented

Is it a violation of an injunction issued under the *Steele* doctrine for the Brotherhood of Locomotive Firemen and Enginemen to take mileage and pay away from senior Negro firemen and give it to junior white firemen, particularly where the adversely affected Negroes are excluded from membership in the all-white Brotherhood and where they are even denied any prior notice or hearing on the action taken against them by the Brotherhood?

Statement

This case presents a new chapter in the sordid story of racial discrimination against Negro locomotive firemen by the all-white Brotherhood of Locomotive Firemen and Enginemen, their collective bargaining representative under the Railway Labor Act. After decades of covert discrimination against the Negro firemen, the Brotherhood was emboldened in 1941 to force an overtly discriminatory agreement, the Southeastern Carriers Conference Agreement, upon the southern railroads. That agreement was a deliberate effort to deprive Negro firemen of the job rights

to which they were entitled by their long years of service on the railroads. In *Steele* v. *Louisville & Nashville R. Co.*, 323 U.S. 192 (1944) and *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210 (1944), this Court struck down the discriminatory restrictions of the Southeastern Carriers Conference Agreement in no uncertain terms, holding that the Brotherhood had violated its duty of equal and nondiscriminatory representation of the Negro firemen for whom it is the exclusive statutory bargaining representative.

When discriminations by the Brotherhood continued unabated even in the face of these definitive rulings, this Court was forced once more to condemn the Brotherhood's discriminations, finding that they constituted "a continuing and willful disregard of rights which this Court in unmistakable terms has said must be accorded to Negro firemen." *Graham* v. *Brotherhood of Locomotive Firemen and Enginemen*, 338 U.S. 232, 234 (1949).

Thereafter, faced with this third defeat in this Court, the Brotherhood finally settled the numerous pending discrimination cases by consenting to the entry of permanent federal injunctions. These injunctions implement this Court's decisions in *Steele*, *Tunstall* and *Graham* by forbidding any further discrimination against the Negro firemen whom the Brotherhood is obligated to represent equally and nondiscriminatorily under the Railway Labor Act. Thus, the 1952 consent injunction entered in the United States District Court for the Middle District of Georgia in the *Washington* case (R. 611), the injunction upon which this civil contempt proceeding is based, restrains the Brotherhood and the Central of Georgia Railway from enforcing any

> "(a) . . . written or oral agreements, or carrying on any practices under such agreements, insofar as said agreements or practices discriminate, on the ground.

of their race or color, against Negro firemen in their employment or occupation as firemen on steam locomotives or as helpers on diesel locomotives, or (b) from denying to plaintiffs or other members of their class their respective rights to assignments as firemen on steam locomotives or as helpers on diesel locomotives based upon seniority and qualifications because they are Negroes. . ."

Unfortunately, the entry of the injunctions did not end Brotherhood discrimination against the Negro firemen.[1] While the Brotherhood had learned after three trips to this Court to avoid overtly discriminatory agreements, it continued its inroads upon the jobs and the pay of Negro workers by means more subtle but no less effective. Methods used by the Brotherhood to defeat the seniority rights of the Negroes under the consent injunctions have been both general and specific. Thus, the Brotherhood has entered into general agreements with the railroads, reducing or limiting the work of firemen, where such reductions and limitations are certain to weigh most heavily upon the older and higher seniority Negro firemen who hold the choice jobs with the most mileage. Where this has not satisfied the appetite of the junior white firemen, the Brotherhood has made specific incursions upon the mileage and pay of particular Negro firemen, as evidenced by this case.[2]

Faced with continuing inroads upon their jobs and live-

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[1] Insight into the post-injunction attitude of some powerful Brotherhood officials in the South may be gained from the statement of a Brotherhood General Chairman to a Negro fireman concerning one such injunction entered by Federal District Judge Mullins—"Judge Mullins gave it to you but I will sure as hell see you don't keep it." J.A. 75, *Oliphant* v. *Brotherhood of Locomative Firemen and Enginemen*, No. 560, October Term, 1958.

[2] See also, discriminations set forth in the record of the *Oliphant* case, *supra*, n. 1.

lihood, despite the injunctions intended to protect their seniority, the Negro firemen as a group sought admission to the Brotherhood. They hoped that, through a measure of internal political power within the Brotherhood, Negro firemen could directly protect themselves against discrimination. Turned down for membership, they filed a class action in 1954 to compel their admission into the Brotherhood. However, their class suit to accomplish this, *Oliphant* v. *Brotherhood of Locomotive Firemen and Enginemen*, failed when this Court refused review "in view of the abstract context in which the questions sought to be raised are presented by this record." 359 U.S. 935; rehearing denied, 359 U.S. 962.

In the present posture Negro firemen continue, fifteen years after *Steele*, to be subjected both to complete exclusion *from* the Brotherhood and to discriminatory bargaining representation *by* the Brotherhood. Negro firemen are thus relegated to this Court's enforcement of the *Steele* doctrine as the sole means for the protection of their jobs and livelihood against continuing Brotherhood depredations on behalf of white Brotherhood members. The question so forcefully presented by the instant case is whether the *Steele* doctrine and the implementing injunctions afford any real protection to Negro firemen against the Brotherhood's expropriation of their earnings for the benefit of the Brotherhood's own white members.

1. *The Taking of Petitioners' Mileage and Pay by the Brotherhood's Introduction of a "Swing Man"*

The act which gives rise to this civil contempt action was the Brotherhood's 1957 introduction of a "swing man" on a five-man assigned run on the Central of Georgia Railway from Columbus to Birmingham, a run held at that time, and traditionally held for over 20 years, by Negro firemen (R.

392-93; 612).[3] Petitioners are the five Negro firemen who share the assigned run on which the swing man was added in March, 1957, and continues to operate today; four times a month this extra man takes a turn from each Negro fireman, representing a loss of approximately 500 miles and $100 a month for each petitioner (R. 612-613). Since petitioners are Negroes, they are barred by the Constitution of the Brotherhood from membership therein and thus from participation in Brotherhood deliberations; moreover, they were not consulted about and had no voice in the Brotherhood's negotiation of the swing man agreement with the railroad which has resulted in a regular monthly reduction in their mileage and pay (R. 119, 161, 456). The first they knew of their loss of earnings was when the swing man was assigned to their run by notice on the bulletin board (id.).

Having no remedy inside the union, the five Negro firemen turned to the federal court wherein the injunction following *Steele* had been issued for their protection. The *Washington* case, in which this injunction had been entered in 1952, was a class action on behalf of Negro firemen employed on the Central of Georgia Railway. On December 18, 1957, petitioners, members of that class, filed in the District Court a motion to intervene in that suit, and to be permitted to file a petition for a rule to show cause why the Brotherhood should not be held in civil contempt for

[3] Jobs are assigned on the railroad on the basis of competitive bidding and award to the bidder with the highest seniority. The reason why the particular "run" here involved has traditionally been held by Negro firemen is that this run is one of the choice assignments on the Columbus Division and, as such, Negro firemen who hold top seniority have successfully bid on it through the years. Negro firemen hold the top seniority because they have traditionally been denied promotion to engineer and have thus stayed on as firemen, accumulating highest seniority while white firemen became engineers. Thus in 1957, in the Columbus Division of the Central, the Division here involved, the 22 Negro firemen were all senior to 64 of the 66 white firemen in the Division. See Appendix B, *infra*, p. 20.

violation of the injunction in the *Washington* case.[4] Their intervention was allowed, their petition was filed, and a rule to show cause was issued (R. 5-23).

2. *Racial Discrimination Demonstrated at the Trial*

At the trial, petitioners demonstrated that the taking of their traditional earnings by the introduction of a swing man on their assigned run on the Columbus Division is racially discriminatory in that only Negro firemen have been reduced in mileage and pay and the reduction has been accomplished for the exclusive benefit of junior white firemen.

(i) *Only Negro firemen reduced in pay.* Petitioners showed that their mileage and pay has been materially reduced by the swing man put on their run, a run traditionally held by Negroes because it is a highly desirable assignment on which Negro firemen with top seniority have top bidding rights (R. 392-93; 542-43). Petitioners showed that a swing man had at the same time been put on another Negro-held run in the Columbus Division and that no swing man has been put on to reduce the mileage of any white firemen (R. 130 et seq., 162).[5] Indeed, petitioners showed that the Brotherhood has not by any device, swing man or otherwise, reduced the actual mileage or pay of a single white fireman on their division (R. 130 et seq., 162).

[4] While the petition was also addressed to the Central of Georgia Railway, during the trial the railroad moved for, and petitioners consented to, the release of the Central of Georgia from any liability and the Court thereupon entered an order exonerating the Central (R. 609, 617). The discrimination which gives rise to the present action, just as the discriminations of the Southeastern Carriers Conference Agreement, was initiated not by the railroad but by the Brotherhood, and it is the Brotherhood rather than the railroad which is therefore chargeable.

[5] Petitioners also showed that no other swing men have been put on any run on any division of the Central since 1951, when a swing man was added to a run shared by five Negro firemen on the Savannah Division (R. 162; 176-77; 399).

All of this proof was completely uncontradicted by the Brotherhood. In its lengthy defense, the Brotherhood was unable to produce a single instance where a swing man has been put on a run held by white firemen (see R. 396-402). And it failed to produce even a single instance in which it has reduced the mileage of a white fireman on petitioners' division.[6] Thus, A. B. Healan, the Brotherhood's General Chairman on the Central of Georgia Railway, and its chief witness below, conceded on cross-examination (R. 446-53) that the Brotherhood had not produced a single instance on the Columbus Division where it has reduced the mileage of a white fireman (R. 449). And the same witness conceded that the Brotherhood had not adduced a single example that it had "*added a man to distribute the work of other men on the Columbus Division . . . except where it was distributing the work of men who were colored firemen*" (R. 452-53).

(ii) *Only white firemen benefit from Negroes' loss.* Not only did petitioners show that the Brotherhood has reduced the mileage and pay only of the Negro firemen, but they showed on the basis of the race-seniority distribution of firemen on the Columbus Division, where the 22 Negroes are all at the very top of the seniority roster of 88 firemen (see Appendix B, *infra*, p. 20), that every reduction in the mileage and pay of Negroes, including that to which petitioners have been subjected, goes to the benefit of junior white firemen (R. 132-35; 402-408). Indeed, the Brotherhood's witness, General Chairman Healan, conceded as much (R. 407-408):

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[6] A single alleged exception on the *Cedartown* District of the Columbus Division (petitioners are on the *Columbus* District of the Columbus Division), where respondents claim reduction in the pay of three white firemen, is discussed *infra* at n. 9, p. 12, where it appears from stipulated payroll figures that there was actually no loss whatever in pay to white firemen.

"Q. And you also testify that when a swing man is cut in on the Columbus Division it necessarily either keeps a white man from having to go out of work or puts a white fireman back into work who is not working, on this division?

"A. That's true, that's true.

"Q. And that was necessarily the effect of cutting a swing man in last year on this run?

"A. That's spreading the work, that's right.

"Q. In other words Negroes, or primarily Negroes, on the Columbus Division had work taken away from them last year when the swing man was added, and whites and exclusively whites were benefited. Isn't that true?

"A. That's true. . ."

In sum, the record makes clear and the Brotherhood conceded at the trial, that when the extra job was carved out of the mileage and pay of the five Negro petitioners, the additional mileage and pay went to junior white firemen. The Brotherhood's introduction of a swing man thus demonstrably constituted selective diminution of the pay of senior Negro firemen, admittedly for the benefit of junior white Brotherhood members.[7]

[7] Petitioners showed also that the reduction aggravated an already serious discrimination against Negro firemen by virtue of the denial of opportunity to add to their pay by exercising engineering seniorities; the stipulated payroll records introduced at the conclusion of the trial (R. 553) make this existing discrimination clear. The payroll mileage and pay records show that of the 66 white firemen regularly employed in 1957 on the Columbus Division, 61 added to their mileage and pay by exercising seniority as engineers, hostlers, etc., while not a single Negro fireman could add a dollar to his pay by working in any capacity other than as a fireman.

Some striking examples from the stipulated payroll of the dual seniority available to white firemen may be found in cases such as those of white fireman R. B. Gable, Jr., who added $2,873.71 in 1957 to his firing pay by exercising engineering seniority during the same months that he worked as a fireman; by white fireman D. R. Cruise, who added $4,482.69 by a similar exercise of double seniority; and by white firemen D. H. Greene,

3. *The Opinion of the District Court*

The District Court's opinion recognizes the validity of much of petitioners' demonstration. The Court found that petitioners are entitled to all the protections of the *Washington* injunction, which forbids discriminatory inroads upon the seniority rights of the Negro firemen (R. 612); it recognized that, having traditionally been denied promotion to engineer, "Negro firemen have become the senior firemen having the right to choice runs and all other rights accompanying high seniority" (id.); it found that for 20 years or more petitioners' assigned run has been shared by senior Negro firemen, who have now been seriously reduced in their monthly pay by the introduction of the swing man on their run (id.); and, finally, the Court conceded that the reduction in petitioners' mileage goes to "*benefit a junior white fireman*" (R. 625). Despite all of this, and despite the District Court's explicit cognizance of the exclusion of petitioners from membership in the Brotherhood (R. 612), the Court, flouting both the letter and spirit of *Steele*, refused to find any violation of an injunction whose very purpose was to safeguard the seniority rights of the Negro firemen against further white Brotherhood incursions:

(i) As concerns petitioners' demonstration that the Brotherhood has reduced the mileage and pay only of Negro firemen, the District Court first referred to a national policy of the Brotherhood of "distributing the work among firemen" (R. 618). The Court accepted the Brotherhood's unsupported allegation that the reduction in petitioners' mileage and pay was effected pursuant to that national pol-

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T. J. Murphy, J. S. Holland, E. M. West, J. O. Landrum, C. M. Maxwell, Jr., E. C. Cannon, Jr., A. M. Wilson, Jr., R. E. Nash, J. F. Tracey, and J. K. McLendon, all of whom added more than $2,000.00 during 1957 to their firing pay by exercising engineering seniority at the same time.

icy of reduction.[8] But the briefest examination of the Brotherhood's evidence in this respect shows that the alleged nationwide policy does not justify the introduction of a swing man on the Columbus Division who reduces both the mileage *and pay* of Negro firemen (R. 225-228). The 1953 policy declaration relied upon by the Brotherhood refers to "reduced mileage in road service *without reduction in pay*" (R. 225). And the notice served on the carriers on January 15, 1956 was likewise "to reduce the mileage in road service *without reduction in pay*" (R. 227). As the Court itself remarked, "that was a proposal to reduce the minimum mileage . . . but not to reduce the pay." (R. 226). Thus on its face the reduction in the mileage and pay of petitioners is a "reduction in pay" utterly inconsistent with what the Brotherhood alleges to be the national policy of reduced work.

(ii) The Court next recited five instances of mileage reduction on divisions and districts of the Central of Georgia *other* than that upon which petitioners are employed, where, it is contended by the Brotherhood, white firemen have been forced to take a reduction in mileage and pay (R. 621-622). In so doing, the Court overruled petitioners' objection that these five isolated instances, the only ones the Brotherhood was able to adduce in its entire defense, represent only *hypothetical* mileage rather than *actual* miles and dollars earned by individual white firemen. Petitioners had pointed out to the Court that these hypothetical mileage figures, which omit the additional mileage and pay that white firemen (but not Negro firemen) can earn as engineers (see supra, n. 7, p. 9), give the entirely false impression that the individual white firemen have lost mile-

[8] The Court made no reference to the fact that, as Negroes excluded from the Brotherhood and given no prior notice, petitioners never had any voice either in the formulation or implementation of that or any other Brotherhood "policy".

age and pay, whereas in fact no net reduction has been suffered by them at all. Thus, in the single one of the five hypothetical instances of "reduction" on which petitioners were able to obtain the payroll for the white firemen involved, petitioners showed that the particular white firemen did not sustain any loss in pay but, on the contrary, by accumulating engineering mileage during the month, they actually *increased* their net pay at the time of their hypothetical reduction.[9]

On these weak reeds of an inapplicable national policy and a hypothetical (and non-existent) pay loss to white firemen, the District Court refused to find that the admitted taking of Negro earnings for the admitted benefit of junior whites was racially discriminatory and a violation of the *Steele* injunction. On July 14, 1958, the Court dismissed the rule *nisi* and the motion to hold respondents in civil contempt (R. 628-629). On July 2, 1959, the Court of Appeals, without analysis or opinion, affirmed the judgment of the District Judge "on the basis of his reported opinion below". The court below, turning its back on *Steele*, thus held that Negro firemen may be stripped of their traditional seniority

[9] According to the Brotherhood's testimony accepted by the District Court, by the addition of an extra white fireman in August of 1957, three white firemen were reduced in the Cedartown pool from a previous half-monthly mileage of 2329 to 1547; with an alleged resulting loss to each of 773 miles (R. 594-597). The three white firemen were identified as C. Williams, Carter and H. Y. Stevens (R. 601-603). However, examination of the actual payroll figures submitted by the railroad for these three white firemen, shows that C. Williams added to his firing mileage and pay by working both as a hostler and as an engineer during August of 1957, and as a result he made $591 in that month, whereas he had made only $568 in the previous month. Similarly, Carter made $554 during August of 1957, whereas he had earned only $391 in July. Far from being reduced, these two men *increased* their actual pay during the month it is claimed they lost mileage and pay. And H. Y. Stevens, the third white fireman involved, is shown also to have worked dual seniorities in August but to have run only 982 firing miles during that entire month, from which it is apparent that he was not regularly employed in this pool at all during the month he was said to have lost mileage therein.

rights, without notice or hearing, by the taking of their mileage and pay for the benefit of the white Brotherhood's own members.

Reason for Granting the Writ

THE LOWER COURT'S COMPLETE DISREGARD OF THE LANDMARK *STEELE* RULING DEPRIVES NEGRO FIREMEN OF THEIR LAST REMAINING PROTECTION AGAINST THE DEPREDATIONS OF THEIR ALL-WHITE STATUTORY BARGAINING REPRESENTATIVE

Petitioners are the victims of an ugly system of racial discrimination in the exercise of the all-white Brotherhood's exclusive statutory bargaining power. In 1957 the Brotherhood sought some way of increasing the earnings of its white members on petitioners' division of the Central of Georgia Railroad; it found the means in the overnight expropriation, for the benefit of junior white firemen, of the traditional mileage and pay of the most senior Negro firemen in the division. Because Negroes are denied Brotherhood membership, petitioners had no internal political power to prevent this expropriation of their mileage and pay, nor were they even given prior notice or opportunity for hearing before the reduction in their working rights became an accomplished fact. Under these circumstances, unless this Court grants review and reverses, no remedy whatsoever is available to petitioners against this cavalier and discriminatory exercise of the Brotherhood's statutory bargaining power.

Even more important than the impact of the ruling below upon petitioners is the emasculating effect of that ruling upon the essence of this Court's *Steele* doctrine.[10]

[10] The *Steele* doctrine, of course, has its primary significance in the area covered by the United States Court of Appeals for the Fifth Circuit. Thus, if this emasculating decision by the Fifth Circuit is left unchallenged, the *Steele* doctrine will have lost its efficacy in the area where it is most needed.

Fifteen years ago this Court's decisions in *Steele* and *Tunstall* established the requirement that a federally empowered bargaining agent, the same Brotherhood which is respondent herein, is forbidden to discriminate against Negro non-members of the union in the exercise of its exclusive statutory bargaining power. When discriminations continued, particularly in the railroad industry where there is a tradition of white union hostility against the Negro workers, this Court was required on three more occasions to reaffirm and reapply the *Steele* doctrine. *Graham* v. *Brotherhood of Locomotive Firemen and Enginemen*, 338 U. S. 232 (1949); *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U. S. 768 (1952); *Conley v. Gibson*, 355 U. S. 41 (1957). But if the court below is right in finding no discrimination on the present impelling record of disadvantage suffered by Negro firemen at the hands of the all-white Brotherhood, then the hard-won *Steele* injunctions against continued discrimination are of little if any value. For the lower court's refusal to characterize as racial discrimination the gratuitous appropriation by an all-white union of the mileage and pay of Negro workers, throws into doubt the continuing vitality of the very essence of the requirement of nondiscriminatory bargaining representation:

(i) In *Steele* this Court stated that to assure fair and nondiscriminatory representation of persons excluded from membership in the exclusive statutory bargaining representative

> "the union is required to consider requests of nonunion members of the craft and expressions of their views with respect to collective bargaining with the employer and to give them notice of and opportunity for hearing upon its proposed action." 323 U. S. at 204.

In the instant case petitioners were utterly denied opportunity to express their views about, or even advance opportunity to know of, the Brotherhood's agreement with the Central of Georgia Railway to introduce the swing man who reduces their traditional monthly mileage and pay. Thus, in direct violation of the explicit stricture of *Steele*, at no time before the swing man was put on their run to help out junior white firemen did petitioners have any opportunity to protest this drastic overnight reduction in their traditional mileage and pay.

(ii) Moreover, the Brotherhood's expropriation of the pay of Negro firemen is directly contrary to the *Steele* requirement of fair and equal bargaining representation, for the Brotherhood's expropriation was for the sole benefit of its own white membership.

It is conceded on all sides that it is the white firemen who benefit from the Brotherhood's taking of the mileage and pay of petitioners. The Brotherhood's chief witness so testified at the trial. See p. 9, *supra*. The District Court so found (R. 625):

> "To the extent that the addition of a swing man creates one more firing job in the overall firing picture for the benefit of a junior fireman way down on the list, this pay loss does benefit a white junior fireman."[11]

[11] The District Court sought to explain this finding away, stating that the addition of the swing man created a firing job for the benefit of junior white firemen

> "because under the old 50% rule, stricken down by the injunction in this case, over a long period only white firemen were added as employees and so many were added that during the last fifteen years no new firemen, white or colored, have been employed in the Columbus division. The identity of firemen at the bottom of the seniority list, therefore, results from discrimination which antedated the injunction and which the injunction did not undertake to correct except for the future. . . ." (R. 625).

The court's inexplicable dismissal of the fact that the work and pay taken by the Brotherhood from Negroes has been given to junior white firemen,

The Brotherhood, in its Court of Appeals brief (p. 5), was equally candid in making the concession, stating that:

> "The *ultimate* effect of adding a 'swing man' to the appellants' group was to make one new job for a fireman near the bottom of the firemen's roster. This fireman would usually be a white fireman. . . ."[12]

Certainly, the appropriation by the Brotherhood of the traditional mileage and pay of senior Negro firemen, is precluded by *Steele* where the mileage and pay which is taken

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improperly raises the pre-injunction discriminatory action of the Brotherhood to the status of a post-injunction defense to new discrimination. While the absence of Negro firemen at or near the bottom of the seniority roster is indeed, as the Court states, the result of pre-1952 discriminations by the Brotherhood, it remains a fact that in 1957, with none but white firemen at the lower end of the seniority roster, the Brotherhood chose to take the traditional mileage and pay of the most senior Negroes on the division to distribute it to junior firemen, who are all white firemen. It is bad enough that the Brotherhood was permitted to bar Negroes from being hired as firemen on the division after January of 1941, but it is absolutely intolerable for it now to appropriate the traditional mileage and pay of the most senior Negroes for the benefit of the most junior whites.

[12] Indeed, the Brotherhood not only concedes that the effect of adding a swing man is to benefit junior white firemen; it even admits a deliberate policy of "adjusting" the mileage of the Negroes "to bring them into line with the mileage run by other [white] firemen . . ." (R. 89). How successful this "adjusting" policy has been is easily demonstrated. Thus, the average 1957 earnings of 21 senior Negro firemen on the Columbus Division was $7,008.28 as compared with average earnings of $6,858.22 for 21 senior white firemen on the Division, all of whom were junior to all of the Negroes, in some cases by as much as 25 years. No less than 7 white firemen hired in 1941 or thereafter were able to earn more pay during 1957 than the most senior Negro fireman on the Division, who was hired in 1917.

As always, it is the senior Negroes who are being "adjusted" for the benefit of the junior whites. In the years before *Steele*, they were "adjusted" all the way off the railroads; now that that is illegal, they are being "adjusted" down to and even below the level of junior whites. It is small wonder that Major Simpson, one of the petitioners, should have recalled in his testimony the pre-*Steele* days when Negroes were the extra men and no one ever suggested putting a swing man on to help them out (R. 160-161).

from the Negro firemen is given by the Brotherhood to its own junior white members. Indeed it is difficult to conceive what constitutes discrimination "against Negro firemen in their employment or occupation as firemen", forbidden by the injunction herein, if it is not the Brotherhood's taking of pay from Negroes and giving it to white Brotherhood members.

(iii) If all this were not enough, however, it is also clear that the taking of the mileage and pay of the senior Negro firemen for the benefit of the junior white firemen, was a totally selective inroad upon the earnings of Negroes, for no reduction of any kind has been effected against white firemen. The Brotherhood did not even attempt to demonstrate that any white firemen on petitioners' division have been forced to take a reduction in mileage and pay. All that the Brotherhood could produce was five isolated "hypothetical" reductions effected against white firemen on *other* districts and divisions of the railroad. And even these were found, upon analysis of the payroll, not to be actual reductions in pay for the white workers involved, who, unlike the Negroes, can and do supplement their firing earnings by concurrent employment in engineering capacities. See p. 11, *supra*. *Certainly, when an all-white union, without even notice or hearing, takes the mileage and pay of Negroes for the benefit of its white members, the resulting heavy burden of disproof of discrimination cannot be met by "hypothetical" figures which bear no relationship to actual dollars and cents.*

Conclusion

The palpably discriminatory nature of the Brotherhood's action requires no embellishment. In response to demands of Brotherhood members desiring to earn more money, the Brotherhood has simply taken part of the tra-

ditional earnings of the senior Negro firemen on the division and distributed them among white firemen. This action, undertaken without any comparable reduction in the earnings of white firemen and accomplished without any prior notice or hearing to the adversely affected Negroes, is patently contrary to the basic requirement of this Court's *Steele* ruling. The considerations which rendered that requirement imperative in 1944 continue in all their vigor today, for this Court just last term refused to review the Sixth Circuit's *Oliphant* decision upholding the exclusion of Negro firemen from the Brotherhood and that decision forever binds the class of Negro firemen. The continuing exclusion of the Negro firemen from membership thus renders imperative the most exacting fair and equal representation of their interests by the Brotherhood; and the most vigorous and sensitive enforcement by the federal courts of the *Steele* requirement of equal treatment. Inasmuch as the decision below utterly disregards that requirement, this Court's review is required to preserve the vitality of *Steele* against a debased system of racial paternalism operating under federal law to the continuing disadvantage of Negro railroad workers.

For the foregoing reasons, it is respectfully submitted that the writ of certiorari should be granted.

JOSEPH L. RAUH, JR.,
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APPENDIX A

Before JONES, BROWN and WISDOM, Circuit Judges

PER CURIAM: This is a suit for civil contempt brought by five Negro firemen against the Railroad and Brotherhood based upon a prior consent injunction prohibiting racial discrimination in the job assignments of Negro firemen employed by Appellee Railroad.

The background facts, analysis of issues, and reasoning have been fully and accurately set forth by District Judge Bootle, and his fact findings amply satisfy the clearly erroneous test of F.R.Civ.P. 52(a). Accordingly we affirm the judgment finding no discrimination under these circumstances on the basis of his reported opinion below. *Washington* v. *Central of Georgia Ry.*, M.D.Ga., 1959 [opinion dated June 27, 1958], —— F. Supp. ——. See also *Oliphant* v. *Brotherhood of Locomotive Firemen and Enginemen*, 6 Cir., 1958, 262 F.2d 359, cert. denied, 1959, —— U.S. ——, 79 S.Ct. 648, 3 L.Ed.2d 636.

AFFIRMED.

(June 30, 1959.)

APPENDIX B

Firemen's Race-Seniority Distribution on the Columbus Division (1957)

1. May 1917	X	31. May 1941		61. March 1943	
2. August 1917	X	32. July 1941		62. April 1943	
3. December 1919	X	33. July 1941		63. May 1943	
4. March 1921	X	34. July 1941		64. May 1943	
5. March 1923	X	35. September 1941		65. June 1943	
6. September 1923	X	36. September 1941		66. July 1943	
7. January 1925	X	37. September 1941		67. September 1943	
8. March 1925	X	38. October 1941		68. October 1943	
9. June 1925	X	39. October 1941		69. December 1943	
10. September 1925	X	40. November 1941		70. January 1944	
11. December 1936	X	41. November 1941		71. January 1944	
12. January 1937	X	42. November 1941		72. February 1944	
13. January 1937	X	43. January 1942		73. March 1944	
14. August 1938	X	44. January 1942		74. April 1944	
15. August 1938	X	45. January 1942		75. May 1944	
16. July 1939	X	46. March 1942		76. May 1944	
17. December 1939	X	47. April 1942		77. November 1944	
18. December 1939		48. April 1942		78. December 1944	
19. January 1940	X	49. June 1942		79. December 1944	
20. January 1940	X	50. July 1942		80. April 1945	
21. December 1940		51. September 1942		81. April 1945	
22. January 1941	X	52. September 1942		82. June 1945	
23. January 1941	X	53. September 1942		83. July 1945	
24. January 1941	X	54. October 1942		84. June 1946	
25. February 1941		55. October 1942		85. November 1947	
26. February 1941		56. November 1942		86. August 1948	
27. February 1941		57. November 1942		87. May 1956	
28. April 1941		58. November 1942		88. October 1956	
29. April 1941		59. December 1942			
30. April 1941		60. March 1943			

"X" denotes seniority positions held by Negro firemen. Unchecked boxes denote seniority positions held by white firemen.

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JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1959.

No. 542.

AL MARSHALL, *et al.*,

Petitioners,

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *et al.*,

Respondents.

BRIEF OF BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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December 31, 1959.

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A copy of the petition for writ of certiorari was received by counsel for the respondent Brotherhood through the United States mail on December 2, 1959. The respondent's brief is being filed with the Clerk of this Court within the thirty days allowed by Rule 24 of the Supreme Court Rules.

QUESTION PRESENTED.

The respondent believes the petitioners to be in error when they state that the judgment rendered by the Court of Appeals for the Fifth Circuit on July 2, 1959, in the above-entitled proceeding presents for review by this Court the question propounded by petitioners on page 2 of the petition for certiorari.

The respondent suggests that the judgment rendered by the Court of Appeals, which affirmed the judgment entered by the District Court, poses but one question that could be open for consideration by this Court, to wit:

Are the findings, concurred in by the District Court and by the Court of Appeals, which are adverse to petitioners' contention that they have been singled out for hostile discrimination because of their race, so clearly erroneous that they must be set aside and replaced by findings made by this Court?

STATEMENT OF THE CASE.

This is a civil contempt proceeding. It was instituted by the five petitioners, who moved to intervene in a case before the District Court for the Middle District of Georgia, Macon Division, designated Civil Action No. 711, and entitled *Washington, et al. v. Central of Georgia Railway, et al.* The motion to intervene was accompanied by a petition which requested the District Court to issue a rule nisi to the defendants, Brotherhood of Locomotive Firemen and Enginemen and the Central of Georgia Railway, requiring these parties to show cause why they should not be held in civil contempt for disobeying a permanent injunction that was entered of record in the *Washington* case on March 25, 1952 (R. 5, 7, 22).

The pertinent provisions of the injunction are quoted in the petition for certiorari, beginning at the bottom of page 3. The purpose of this injunction is the prevention of discriminatory treatment of the Negro firemen employed on the Central of Georgia Railway by the Brotherhood and the Central of Georgia Railway in the course of making and enforcing agreements pertaining to rules of employment and working conditions applicable to the firemen's craft. The Brotherhood and the Railway consented to the entry of this injunction in disposition of the *Washington* case. The terms of the injunction were approved by counsel who now represent petitioners in the instant proceeding.

The question posed by the contempt proceeding was whether an agreement between the Brotherhood and the Central of Georgia Railway, dated February 21, 1957, and made effective March 1, 1957, which lowered the limits on mileages that firemen would thereafter be permitted to run in a month in each class of train service, was action of a kind prohibited by the terms of the injunction. In resolving this issue, there was no occasion for the District Court to look to the decisions of this Court in the *Steele* and *Tunstall** cases, or to interpret the Railway Labor Act. The essential facts bearing upon the lowering of the mileage limitations of which petitioners complain are as follows.

Prior to March 1, 1957, the firemen's collective agreement on the Central of Georgia Railway contained the following rules designed to regulate the mileage that firemen would be permitted to accumulate in one month when working in passenger, freight, or yard service:

> "In the regulation of assigned or extra passenger service, a sufficient number of men will be assigned to keep the mileage or equivalent thereof within the limitations of 4,000 and 4,800 miles per month; in assigned, pooled, chain-gang or any other service paying freight rates, a sufficient number of firemen will be assigned to keep the mileage or the equivalent thereof within the limitations of 3,200 and 3,800 miles per month. Neither the maximum nor the minimum is guaranteed.

---

* 323 U. S. 192 and 214. Space in this brief is not devoted to answering the misstatements by petitioners at page 3 of their petition, for the Justices of this Court know that the issue decided by this Court in the *Steele* and *Tunstall* cases was raised by a challenge to the legal sufficiency of the allegations in the complaints to state a cause of action, and the ruling by this Court in those cases did not preclude a subsequent trial on the merits, as occurred in *Rolax v. Atlantic Coast Line RR Co.*, 91 F. Supp. 985 (1950).

"In assigned yard service regulation will be made by requiring each regularly assigned man to lay off when he has earned 35 days or its equivalent per month. To keep within the mileage regulations set forth in this section, additional crews may be added or swing men used to relieve the regular men on specified days. If regulation cannot be made as provided herein, men will be required to lay off so that the equivalent of 4,800 miles in passenger service, or 3,800 miles in other assigned service, will not be exceeded." (R. 187-188.)

These rules were originally part of an agreement between the Firemen's and Engineers' Brotherhoods, effective as long ago as 1918, and which became known throughout the railway industry as the Chicago Joint Agreement (R. 198). The language of these rules has become standard terminology in the firemen's and engineers' collective agreements throughout the railway industry (R. 198, 347). Rules limiting the amount of mileage engineers and firemen are allowed to run in a month provide the means by which engineers and firemen near the top of the seniority rosters are prevented from "hogging all the mileage." (R. 186, 466-467.) This insistence by the senior firemen and engineers on "hogging" the available mileage is not limited to any race, but is common to senior engineers and firemen generally. This identical struggle between engineers and senior firemen, on the one hand, and junior firemen on the other hand, has waged continuously down through the years. The decision in *Brotherhood of Locomotive Engineers v. Chicago, Milwaukee & St. Paul Rd.*, 41 F. Supp. 751, provides a comprehensive summary of the methods and technique involved in this contest, undistorted by the racial issue.

High mileage is not synonymous with high seniority. The firemen's collective agreements contain no provision

entitling senior firemen to insist on accumulating greater mileage in a month than a junior fireman may earn, and the petitioners make no claim based on such a rule. High seniority merely enables a fireman to outbid junior firemen for a job having a feature or features that the senior fireman prefers.

The February 21, 1957, agreement made no change in the language of the standard mileage rules as quoted, *supra*. The agreement simply reduced the *minimum* mileages prescribed by the rules. The minimum in passenger service was reduced from 4000 to 3800 miles per month. The minimum in freight service was reduced from 3200 miles per month to 3000 miles. In yard service the number of days of work for which yardmen would be permitted to obtain credit was reduced from 35 to 26 days per month (R. 32, 192).

The second paragraph of the mileage regulation rules, quoted *supra*, states that in regulating the firemen's mileage between the maximum and minimum limits prescribed by the rules, "swing men" may be "used to relieve the regular men on specified days." This is the method of mileage regulation used when two or more firemen are assigned to trains that operate on an established schedule, provided the addition of the swing man does not reduce the available mileage for each man below the minimum limit. The "swing man" replaces each of the regularly assigned men on specified days of the month. The addition of a "swing man" to a group of firemen assigned to jobs on scheduled runs is *one* of the standard methods of regulating mileage used on all railroads throughout the country (R. 348-349).

Each of the five petitioners for many years prior to March 1, 1957, had been running 3760 miles per month. This was just 40 miles per month below the *maximum* per-

mitted by the mileage rules, quoted *supra*. To accumulate this near-maximum mileage, the five petitioners would make a round trip from Columbus to Birmingham and back 12 times in one month of thirty days. The round trip was 314 miles. This trip would be completed in one day. Thus, the petitioners would regularly report for work 12 days in a 30-day month. The remaining 18 days in each month were theirs to do with as they pleased. This mileage—3760 miles in one month—enabled each of the five petitioners to earn in excess of $650 each month, and a yearly annual income in excess of $7,000.

The addition after March 1, 1957, of a sixth man to the four scheduled trains on which the petitioners were employed reduced the average mileage earned by the petitioners to 3140 miles per month (R. 123). This would have been below the minimum of 3200 miles per month in freight service required by the mileage rules before the March 1, 1957, agreement became effective. It is materially above the 3000 mile minimum limit in freight service that has been in effect since March 1, 1957.

A new job was thus created for a sixth man in the petitioners' group as a result of the February 21, 1957, agreement. This sixth job, or "swing man" job, has been held most of the time since March 1, 1957, by one of the senior Negro firemen (R. 156-'57), notwithstanding an affidavit by one of the petitioners that the swing job is held by a white fireman. (See R. 14, and 619 (p. 9 of District Court's opinion.)) When taking the swing job the Negro fireman vacated some other assignment, and this assignment was in turn filled by some fireman having less seniority than the swing man. Eventually, the effect of adding the swing man was a recall to work of some junior fireman on the lower part of the fireman's seniority

roster who had theretofore been without employment (R. 131-133).

Negro firemen have traditionally been passed over by management when calling up firemen to establish, through examinations, their qualifications for promotion to engineers. And Negro firemen are now protected by permanent injunction from the need to comply with the forced promotion rule (R. 10-11). These circumstances, and the attrition of passing time, have resulted in the Negro firemen becoming the senior firemen on the Central of Georgia Railway, and the junior firemen being predominantly white employees. It follows from this circumstance that restrictive regulation of the firemen's mileage will likely cause some senior Negro firemen to earn less mileage, and more jobs will become available for firemen on the lower positions of the seniority roster.

Petitioners assert that regulating firemen's mileages under these circumstances is one form of hostile, racial discrimination prohibited by the consent injunction entered in the *Washington* case on March 25, 1952. *Whether or not the regulation of firemen's mileages under these circumstances is prohibited by the terms of the March 25, 1952, injunction, is the issue that was decided by the courts below.* Having had the benefit of a trial, followed by briefs, the District Court stated its ultimate finding as follows:

> "After a careful consideration of all of the interveners' contentions and all evidence adduced, this Court is convinced that no discrimination, and hence no contempt has been shown." (R. 618.)

This finding and conclusion is based upon a detailed analysis by the District Court of petitioners' charge of racial discrimination and their evidence. The Court's

analysis and reasoning is reproduced at pages 614 to 625 of the Record herein.

The Court of Appeals for the Fifth Circuit affirmed the District Court's findings in their entirety. At page 12 of the petition for certiorari, petitioners make this statement regarding the review by the Court of Appeals of the District Court's findings:

> "On July 2, 1959, the Court of Appeals without analysis or opinion, affirmed the judgment of the District Court 'on the basis of his reported opinion below.' "

The implication of this statement is that the Court of Appeals restricted its review of the case to a mere examination of the District Court's opinion. The Per Curiam opinion by the Court of Appeals justifies a different conclusion. The essential part of this opinion reads as follows:

> *"The background facts, analysis of issues, and reasoning have been fully and accurately set forth by District Judge Bootle, and his fact findings amply satisfy the clearly erroneous test of F. R. Civ. P. 52 (a).* Accordingly we affirm the judgment finding no discrimination under these circumstances on the basis of his reported opinion below." (P. 19, Appendix A, petition for writ of certiorari.) (Emphasis ours.)

Other courts, in addition to the District Court for the Middle District of Georgia and the Court of Appeals for the Fifth Circuit, have concurred in findings to the effect that the regulation of firemen's mileages on the Central of Georgia Railway, including particularly the addition of the sixth man to the petitioners' group in March, 1957, was not an act of discrimination against the Negro firemen, prompted by considerations of race or color. The District Court that heard the case of *Oliphant v. Brotherhood of*

Locomotive Firemen and Enginemen, cited by petitioners, found that the agreement effective March 1, 1957, which reduced the minimum mileage limitations applicable to firemen employed on the Central of Georgia Railway "was a legitimate practice used by most unions for reasons other than discrimination." The District Court concluded thus:

> "* * * this court cannot state definitely that this Brotherhood adopted these practices for the purpose of discrimination against Negroes." (156 F. Supp. 89, at 90.)

An appeal was taken by the plaintiffs in the *Oliphant* case from the District Court's findings and conclusions. The Court of Appeals for the Sixth Circuit confirmed the District Court's findings. The Court of Appeals stated its conclusions regarding the charge of racial discrimination as follows:

> "In his carefully considered opinion, Chief Judge Paul Jones decided the facts pertaining to discrimination adversely to the contention of appellants * * *
>
> "A meticulous examination of the detailed record in this case has been made by us, resulting in our opinion that the above findings of the District Court are eminently correct and are supported by substantial evidence. There is, therefore, no occasion for further consideration of appellants' second argument." (262 F. 2d 359, at 360.)

Certiorari was denied in the *Oliphant* case. (355 U. S. 893.)

The upshot is that two District Courts and two Courts of Appeals have weighed the evidence presented by the petitioners in support of their charge that the Brotherhood has been subjecting the petitioners herein to discriminatory treatment of a hostile character in connection with the regulation of firemen's mileages on the Central of Georgia Railway.

The Supreme Court's Rule Regarding Finality of Findings Concurred in by Two Lower Courts.

The finality attached by this Court to findings concurred in by two courts below appears to have been settled for a very considerable period of time, and consistently adhered to.

On December 16, 1889, this Court handed down a decision in the case of *Dravo v. Fabel*, 132 U. S. 487, in which the plaintiff had sought to have certain deeds to real estate set aside on the grounds that the conveyances were fraudulent and void as to the grantor's (Dippold) creditors and assignees in bankruptcy. The results of the proceedings in the lower Federal courts were summarized by this Court as follows:

> "Conceding that the case was an uncommon one, and that some of its circumstances tended to excite suspicion as to the integrity of the transaction between Dippold and his grantees, the conclusion of the District Court was that the clear weight of the evidence was on the side of the defendants, and that the bill should be dismissed. It was accordingly so decreed. *Dravo v. Fabel*, 25 Fed. Rep. 116. A similar decree was passed in the Circuit Court."

This Court affirmed the judgment below, adding the following explanations:

> "The case comes within the ruling in *Lammers v. Nissen* (Sup. Ct. Rep. Lawyer's Ed. Book 25, p. 562), where the finding of the court of original jurisdiction, upon a mere question of fact, was affirmed by the Supreme Court of the State. Chief Justice Waite said: 'Under these circumstances, we ought not to disturb the judgment of the state court unless the error is clear. No less stringent rule should be applied in cases of this kind than that which formerly governed in admiralty appeals, when two courts had found in the same way on a question of fact.'

"Without stating the evidence in detail, we content ourselves with saying that, upon a careful review of all circumstances disclosed by the record, we do not feel justified in disturbing the conclusion reached by the District and Circuit Courts upon mere questions of fact."

This Court has many times affirmed and adhered to the rule stated in the *Fabel* case, that it will not undertake to review the evidence of record when there are concurrent findings by two courts below, unless it be shown that the findings are clearly erroneous.

Stuart v. Hayden, 169 U. S. 1, at 14 (1898).

Baker v. Cummings, 169 U. S. 189, at 198 (1898).

Towan v. Moore, 173 U. S. 17, at 24 (1899);

Hy-Yu-Tse-Mil-Kin v. Smith, 194 U. S. 401, at 412 (1904);

Dun v. Lumbermen's Credit Assoc., 209 U. S. 20, at 24 (1908);

Washington Securities Co. v. United States, 234 U. S. 76, at 78 (1914);

Gilson v. United States, 234 U. S. 380, at 383 (1914);

Baker v. Schofield, 243 U. S. 114, at 118 (1917);

United States v. O'Donnell, 303 U. S. 501, at 508 (1938);

Williams Manufacturing Co. v. United Shoe Machinery Corp., 316 U. S. 364, at 367 (1942);

District of Columbia v. Pace, 320 U. S. 698, at 702 (1944);

Goodyear Tire & Rubber Co. v. Ray-O-Vac Co., 321 U. S. 275, at 278 (1944);

Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U. S. 271, at 275 (1949);

Allen v. Trust Co. of Ga., 326 U. S. 630, at 636 (1946).

In *Baker v. Schofield, supra,* the purpose of the proceeding was to set aside a fraudulent conveyance. The District Court and the Court of Appeals found that the conveyance was not bona fide. On certiorari, this Court spoke as follows:

> "Our consideration of the evidence must be governed by the well-settled rule in this court that, when two courts have reached the same conclusion on a question of fact, their finding will not be disturbed unless it is clear that their conclusion was erroneous * * * the concurrent decisions of the courts upon the establishment of a trust as a question of fact will be followed unless shown to be clearly erroneous."

In *Allen v. Trust Co., supra,* the action was against the Collector of Internal Revenue to recover an estate tax which had been levied upon property allegedly conveyed by the decedent in contemplation of death. The District Court concluded that the acts of the decedent had not been undertaken in contemplation of death. The Circuit Court sustained the findings of the District Court. On certiorari to this Court, the effect of concurrent findings of fact by the two courts below was stated by this Court as follows:

> "Many gifts, even to those who are the natural and appropriate objects of the donor's bounty, are motivated by 'purposes associated with life, rather than the distribution of property in anticipation of death.' * * * These motives cover a wide range. * * * These may be the desire to recognize special needs or exigencies or to discharge moral obligations. * * * Whether such a desire was the dominant, controlling or impelling motive is a question of fact in each case. * * * Here two courts have resolved that question of fact in favor of respondents. * * * These findings, being concurrent findings of the two lower courts,

will be accepted here without re-examination of the evidence."

The respondent would have supposed that the issue of racial discrimination had been eliminated from this case by the concurrent decisions of the courts below, unless the petitioners came before this Court prepared to demonstrate that the findings by the courts below are "clearly erroneous."

The petition for certiorari filed herein takes no note of this Court's long-established rule against disturbing concurrent findings made by two courts below. The petitioners' statement of the case, and the reason advanced as to why this Court should grant the writ, proceed as if the issue of racial discrimination would be before this Court on a *de novo* basis if certiorari were granted.

Facts Bearing Upon Petitioners' Charge of Racial Discrimination.

The Central of Georgia Railway is divided for administrative purposes into three operating divisions, and these divisions comprise five seniority districts. One of the operating divisions is the Columbus Division. This Division consists of two seniority districts. These are known as the Columbus Seniority District and the Cedartown Seniority District. The petitioners' employment is confined to the Columbus Seniority District of the Columbus Division (R. 246-249).

In considering the rule nisi which required the Brotherhood and the Central of Georgia Railway to show cause why they should not be punished for contempt of court, the question uppermost was how to prove the existence of a negative situation, to wit, the *absence of intent* to subject the petitioners to discriminatory treatment

of a hostile character. It appeared to the respondents that if the court were provided with pertinent information relative to every train regularly operated over the lines of the Central of Georgia Railway, including information as to the name and race of each assigned fireman and the mileage each would normally be able to earn during one or more average periods, the court would have a reliable basis for determining whether the addition of a sixth man to the petitioners' group in March, 1957, put the petitioners in an unfavorable position relative to other firemen holding regular jobs anywhere on the Central of Georgia Railway. This composite summary was accordingly assembled by the respondent in a document designated "Chart A," which is reproduced in the Appendix attached hereto. Chart A was designated defendants' Exhibit B at the trial, and admitted into evidence (R. 387).

Each train, or group of related trains, described in Chart A has been given a number for identification purposes. This number appears in the left hand column on each page of Chart A. The Court's attention is first invited to page 4a of Chart A. This is a summary of all *passenger* trains operated by the Central of Georgia. The Court will observe at the foot of page 4a that the average mileage that the firemen, both white and colored, earned during the first 15 days of March, 1957, was 1602 miles, which is the equivalent of 3204 miles per month. Between January 1st and 15th of 1958, these firemen earned an average of 1772 miles, or an average of 3544 miles in a month. The Court will recall that the mileage rules in effect after March 1, 1957, prescribed a minimum mileage limit of 3800 miles per month in passenger service (R. 192).

Thus, the firemen assigned to the passenger trains that are being operated by the Central of Georgia Railway

fall considerably short of earning even the *minimum* limit of 3800 miles per month contemplated by the mileage rules.

The Court's attention is next invited to pages 1a, 2a, and 3a, of the Appendix. These pages present a summary of what may fairly be described as the "ordinary" *freight* trains regularly operated by the Central of Georgia Railway. The Court will observe at the foot of page 3a that for the period of April 1 to 15, 1957, the firemen assigned to these trains averaged 1518 miles, or a total of 3036 miles in a month. During the period of January 1 to 15, 1958, they averaged 1512 miles, or 3,024 miles per month.

The fact should be apparent that these mileages have been brought as close to the minimum limit of 3000 miles per month set by the February 21, 1957, agreement as is practicable.

A detailed review of the information relative to each one of the trains listed on Chart A was provided by the Brotherhood's General Chairman, Mr. A. B. Healan. This testimony is recorded at pages 250 to 329 of the Record.

Page 5a of the Appendix is a summary of four "extraordinary" freight trains or pools of freight trains, and also of two "extraordinary," regularly scheduled, passenger trains. These trains are designated "extraordinary" to distinguish them from the other trains described on pages 1a to 4a, of the Appendix. The reason they are designated "extraordinary" is because the firemen holding jobs on these trains are able to average well above the minimum limits prescribed by the mileage rules. These situations exist because the distances between terminals, and other circumstances, make it impossible to reduce the mileages earned by the firemen on these trains by the addition of swing men or pool men without reducing their mileages well below the 3000 mile limit in freight service and the

3800 mile limit in passenger service. These runs are described in detail in the testimony of General Chairman Healan beginning at page 329 of the Record.

It will be noted that between April 1st and 15th, 1957, the firemen on the freight trains described on page 5a of the Appendix averaged 1854 miles, which amounts to an average of 3708 miles per month. Between January 1 and 15, 1958, these firemen averaged 1917 miles, or 3834 miles per month.

The Court should observe that of the firemen assigned to these "extraordinary" runs, the great majority are Negro firemen. During the later check period, in January, 1958, there were 14 colored firemen and 1 white fireman on these trains. If the petitioners are to be understood as complaining of the advantages these jobs provide mileage-wise, their complaint to this extent is necessarily *dehors* the charge of racial discrimination.

The trains listed in Chart A provide a complete summary of all of the opportunities for employment available to firemen over the entire Central of Georgia Railway, save for one important exception. This exception consists of what is known as the "extra board" of firemen maintained on each of the five seniority districts comprising the Central of Georgia Railway. These extra boards invariably consist of the younger firemen, and the men report for work on a first-in first-out basis when called to fill vacancies occasioned by the laying off for any reason of regularly assigned firemen. More will be said later about the adjustment of mileages earned by the men on the extra boards. The unemployed firemen on each seniority district are those whose seniority is less than the seniority of the firemen whose names make up the extra board.

The mileages indicated on Chart A are the mileages firemen assigned to each of the trains or group of trains

described in Chart A would earn if they reported for duty regularly, and did not work overtime or earn other minor sums because of extraordinary conditions occasionally encountered during a tour of duty. The respondent believed these additional increments of earning would average out for all firemen to a fairly uniform sum over a period of time, so that the *actual* available miles provided by each job assignment listed in Chart A would provide a fair, relative measure of the job held by each regularly employed fireman on the Central of Georgia Railway.

However, counsel for the petitioners were not satisfied with this assumption, and so they insisted during the first days of the trial that the true picture of the "sordid story" and "ugly system" petitioners have been subjected to in the guise of mileage regulations, would be revealed only if the true payroll records were brought before the Court (R. 373-386). The District Court accordingly continued the trial from February 6 to April 4, 1957, and ordered the Central of Georgia, as requested by petitioners, to furnish its payroll records for all firemen employed on the Columbus Division (Columbus and Cedartown Seniority Districts) for the months of July and December, 1956, and the full year of 1957. These records were reproduced on I. B. M. tabulator sheets and are sizeable exhibits, designated Plaintiffs' Exhibits 3 to 8, inclusive (R. 553).

In order that the pertinent information contained in these payroll records would be available to the District Court in a usable and informative manner, the respondent prepared Charts B to H, inclusive, from the data contained in these exhibits. These charts are reproduced in the Appendix to this brief.

Chart B, which appears on page 7a of the Appendix, is a list of the names, in alphabetical order, of the Negro

firemen employed on the Columbus and Cedartown Seniority Districts during the months of July and December, 1956. This Chart discloses the miles run and the dollars earned by each of the Negro firemen in the months of July and December, 1956.

These payroll records disclose that the petitioners' average earnings per month shortly before the agreement reducing the minimum mileage limits was put into effect on March 1, 1958, were as follows:

Al Marshall	$ 610.65
Major Simpson	660.88
Will Covington	614.19
Jim Mullins	642.31
Marion Vincent	559.43
TOTAL	$3,087.46

Chart C, reproduced on pages 8a to 10a of the Appendix, provides similar information relative to the earnings of the white firemen employed on the Cedartown and Columbus Seniority Districts during July and December, 1956.

Chart D, on page 11a of the Appendix, shows the wages earned by the Negro firemen employed on the Columbus Seniority District during the year *1957*. The petitioners' average monthly earnings during this period were as follows:

Al Marshall	$ 603.01
Major Simpson	617.51
Will Covington	633.73
Jim Mullins	627.55
Marion Vincent	603.94
TOTAL	$3,085.74

Chart E, on pages 12a to 14a of the Appendix, discloses the wages earned during the year 1957 by each

white fireman employed on the Columbus Seniority District. These earnings are broken down so as to disclose what each white fireman earned working as fireman, and, if he worked as hostler or as engineer at any time during 1957, these earnings are recorded separately. Total earnings appear in the right-hand column.

Chart F, on page 15a of the Appendix, is a comparative table of the 1957 earnings of the 16 Negro firemen employed on the Columbus Seniority District and the earnings of the 16 *highest paid white firemen* employed on the same district. It will be noted that the only white fireman who earned any material amount more than was earned by the petitioners was W. Burke, Jr. A glance at Chart G discloses that Burke worked almost full time as an engineer. He earned only $648.34 as a fireman during the year 1957, while earning $7,907.46 working as engineer.

Chart F discloses that the average earnings of *all* Negro firemen employed on the Columbus Division during the year 1957 was $7,090.99. The five petitioners herein earned an average of $7,401.49. The fact should be noted that these are the earnings of the petitioners during the year in which the "swing man" was a member of the petitioners' work group after March 6 of that year (R. 531).

These figures deserve comparison with the average earnings of the 16 highest paid white firemen, all of whom had previously been promoted to engineer and worked as engineers during a substantial part of 1957 (disclosed by Chart E). The average *total* earnings of these sixteen white firemen, including W. Burke, Jr., was $7,020.31 during 1957.

The average total earnings during the year 1957 of all of the white firemen employed on the Columbus Seniority District was $3,950.28.

Finally, we invite the Court's attention to Chart G, at page 17a of the Appendix. This chart provides a graphic illustration of the relative earnings during the year 1957 of all firemen having seniority on the Columbus Seniority District, including engineers who worked at any time as firemen during the year 1957. The names on this roster are in the same relative order that they appear on the firemen's seniority roster on the Columbus Seniority District. The length of the bar to the right of the name corresponds to the earnings of that man during 1957. The black bars represent the Negro firemen. The white firemen as far down the list as number 85 have all been promoted to engineer and worked as engineers during some period in 1957.

Thus, the payroll records serve the petitioners' cause no better than did the summary of the trains operated over the lines of the Central of Georgia Railway presented by Chart A. As a matter of fact, the payroll records serve the petitioners' purpose less than did the information in Chart A for the payroll records establish beyond cavil that the petitioners' earnings continue at a rate that places them at the peak of the firemen's roster, earningswise.

Beginning on page 7 and continuing through page 10 of the petition for certiorari, petitioners tell this Court, as they did the courts below, that there has been no regulation of white firemen's mileages on the Central of Georgia Railway to lower levels. In short, what the petitioners would have this Court believe is that the Brotherhood and the Central of Georgia Railway, while under a permanent injunction forbidding them to subject Negro firemen to hostile discrimination based upon racial distinctions, entered into the agreement of February 21, 1957, with the purpose in mind of reducing the petitioners' mileages for the benefit of junior white firemen and with no intention

of enforcing the lowered mileage limits against white firemen.

Petitioners say that not one example of lowering a white firemen's mileage was proved by the defendants; yet a study of the Record, particularly from pages 437 to 453, shows constant effort on the part of petitioners' counsel to exclude testimony by General Chairman Healan—testimony giving examples of the regular enforcement of the lowered mileage limitations against the pools and extra boards composed of white firemen throughout the Central of Georgia Railway.

In contrast with the four freight trains on which the five petitioners have held the jobs of firemen for years, operating between Columbus, Georgia, and Birmingham, Alabama, on a fixed schedule, the vast majority of freight trains are not operated on a fixed schedule. They operate unscheduled, proceeding from terminal to terminal when ready, and the jobs of fireman on these trains are frequently filled by a group of firemen commonly referred to as a "pool." The firemen comprising a pool follow a regular order in responding to calls to work. Mileage earned by firemen operating in a pool is regulated by increasing or decreasing the number of men in the pool on regular checking dates, usually the 1st and 15th of each month.

Adding a man to a pool of firemen, or keeping a man in the pool when it might otherwise be necessary to remove him from the pool because of higher mileage limitations, produces precisely the same effect on the earnings of the men in the pool as does adding a swing man to a group of firemen holding jobs on a group of regularly scheduled freight trains. This is true notwithstanding the repeated efforts by petitioners' counsel throughout the trial to prevent introduction of evidence by respondent ii-

lustrating the application of the March 1, 1957, reduction of the minimum mileage limits to pools of firemen and to the extra boards (R. 400-426).

As stated at an earlier place in this brief, each of the five seniority districts comprising the Central of Georgia Railway maintains an "extra board" of firemen. The extra board provides the substitutes to meet the carrier's need for firemen to fill the jobs of firemen assigned to regular runs but who fail for any one of a variety of reasons to report for duty. The need for additional firemen in the freight and passenger pools is also provided by the extra board on each seniority district (R. 208). When fewer firemen are needed in the freight and passenger pools, those that are not needed are returned to the extra board, and the total number on the extra board is reduced by returning the firemen with the least seniority to an unemployed status.

The mileage run by firemen working in freight and passenger pools, and working off the extra boards, is recorded by them in the carrier's offices when they return from each trip. On the 1st and 15th of each month the records of the mileage accumulated by each fireman is totalled, and then the Brotherhood's local chairman and the carrier's local officer agree on whether additions should be made to the pools and the extra boards, or the number of firemen reduced (R. 218-220). This is the means by which the mileages earned by firemen working in the pools and off the extra boards are kept regulated to a level that is consistent with the current Brotherhood policy of spreading the available work (R. 348-349).

It would have been out of reason to have loaded the trial record in this proceeding with a reproduction of the carrier's records showing the mileages earned by the firemen in each pool and on each extra board, on each of the

five seniority districts, for each two-week period from March 1, 1957, to the date of trial, for the purpose of proving that the reduced minimum mileage limits that were made effective March 1, 1957, have been consistently and conscientiously enforced throughout the Central of Georgia Railway. Reason dictated that this proof be limited to a few examples (R. 572-573). These examples are in the Record at pages 340, 358-365, 438-448, 459-462, and 560-605. They were made a part of the record in the face of firm insistence by counsel for the petitioners that the best evidence rule and the hearsay rule be strictly observed notwithstanding the proceeding was not being tried before a jury (R. 358-365, 557-567).

The lowering of the minimum mileage limits on March 1, 1957, served to spread the work by creating additional jobs in two ways. First, it permitted the *addition* of men to pools and to the extra boards. Naturally, the addition of a man, or men, to a pool or extra board will lower the mileage earned by the other men in the pool or board. Since the mileages earned should be kept at the minimum or above, it follows that by lowering the minimum, the available mileage can be divided among more men. Second, lowering the mileage limits also had the effect of allowing men to *stay* in the pools and on the extra boards when it would have been necessary to reduce their number to prevent their mileages from dropping below the former minimums of 3200 miles in freight service and 3800 miles in passenger service (R. 449-454).

The Director of Personnel on the Central of Georgia Railway, Mr. W. J. Collins, was a witness at the trial and testified to the uniform enforcement throughout the Central of Georgia Railway of the February 21, 1957, agreement reducing the firemen's minimum mileage limitations. After testimony as to how the agreement came into being

(R. 520-526), Mr. Collins then testified regarding the systemwide application of the agreement as follows:

> "Q. And of course this rule that we are dealing with, the rule change, it had application, or has application over the entire system?
>
> A. Oh, yeah.
>
> Q. All firemen?
>
> A. Yes, sir.
>
> Q. Both whites and Negroes?
>
> A. Applies to every fireman on it, under that contract." (R. 526.)

No effort was made on cross examination by petitioners' counsel to discredit these singularly important statements by the Director of Personnel. See the Record at pages 528 and 529.

Counsel for the petitioners has tried throughout this proceeding to embellish their claim of racial discrimination by asserting that because white firemen often have seniority rights as engineers or as hostlers in addition to seniority rights as firemen, while Negroes have rights to employment only as firemen, the earning power of the Negro suffers in comparison with the white fireman. The petitioners say that after a white fireman has accumulated in one month all of the mileage permitted by the firemen's rules, it is common practice for the employee to take a job as hostler or as engineer for the remainder of the month.

This is a wholly mistaken concept.

The petitioners did not support this contention during the trial by introducing payroll records, although, as we have pointed out, they obtained a court order requiring the carrier to produce payroll records for other purposes. The only support in the record for this contention is the personal conclusions expressed by petitioners Al Marshall and Major Simpson on direct examination. Marshall's tes-

timony is found at pages 140-141 of the Record, and Major Simpson's testimony is found at pages 167 to 170.

However, on cross examination Marshall testified that he was unable to support his opinion by so much as one name or one instance of a white fireman being allowed to work out the remainder of the month as an engineer or hostler after having accumulated all of the mileage permitted by the firemen's mileage rules for one month. Furthermore, Marshall correctly qualified his testimony on direct examination by admitting that a fireman is permitted to take a run as engineer or hostler after accumulating a month's mileage working as fireman *only when the need for his service is in the nature of an emergency*, caused by a train being ready to start its run and there being no regular engineer available to take the job. The carrier must then press into service any available man qualified to do the job. (See the Record at pages 148 to 150.)

Major Simpson testified on direct examination that he had observed demoted engineers R. L. Upchurch, R. B. Gable, and T. J. Murphy supplementing their earnings as firemen by working as engineers during the same months in which they had been demoted to the firemen's craft and were working as firemen. But on cross examination Simpson admitted that he had simply observed the three demoted engineers on passing trains sitting on the right side of the locomotive cab, and Simpson admitted that he had no knowledge as to whether these demoted engineers had already accumulated the full mileage permitted by the firemen's rules at the time he saw them working as engineers.

General Chairman A. B. Healan testified emphatically while being cross examined that "*the only way a white fireman can catch a trip as an engineer after getting*

mileage as a fireman is in emergencies when we have no other engineers, and the same thing would work with these firemen (referring to Negro firemen). They would be used in other firing classes, and hostler helping in emergencies. It works both ways." (R. 496-500.)

The contention that white employees, after completing a month's work as firemen, regularly augment their earnings as firemen by taking jobs as engineers or hostlers during the remainder of the month is completely dissipated by the payroll records disclosing the earnings in each class of service of the white firemen employed on the Columbus Seniority District, reproduced in Chart E of the Appendix.

Since demoted firemen, R. L. Upchurch, R. B. Gable, and Jack Murphy, were particularly singled out by the petitioners as illustrations of this alleged privilege that white firemen enjoy, a breakdown of the earnings of these employees has been reproduced as Chart H on page 19a of the Appendix, and to demonstrate how "unfavorably" the petitioners' earnings compare with the "favored" white employees, we have also reproduced on Chart H the petitioners' 1957 earnings.

Notwithstanding the fact that petitioners' contention has no statistical support whatever in the evidence offered by them at trial, and the payroll records furnished by the carrier at the District Court's order positively and completely refute the idea that white enginemen have cumulative opportunties for earnings of which they regularly avail themselves, disparately to the Negro firemen, the petitioners nevertheless come before this Court urging the same fallacious argument. See Footnote 7, page 9, of petition for certiorari.

The agreement of February 21, 1957 is part and parcel of a national program or policy adopted by the 1953

Convention of the Brotherhood of Locomotive Firemen and Enginemen (R. 220-230). This policy was occasioned by the seriously depressed employment condition which prevails throughout the railway industry.

The petitioners tell this Court, at page 11 of their petition, that the policy formally adopted by the Brotherhood's 1953 Convention authorized the negotiation of agreements which would reduce the level of the firemen's mileages but which would not result in a reduction of take-home pay. Therefore, petitioners say, the February 21, 1957, agreement which reduced the firemen's mileage limits on the Central of Georgia Railway is violative of the Brotherhood's own policy because the enforcement of this agreement caused a reduction in pay.

To judge the credibility of this statement, we invite the Court's attention to pages 222 to 224 of the Record, where is reproduced the resolution as first proposed to the 1953 Convention by Lodge No. 724, and the terms of the resolution as finally adopted.

The Court will observe that the petitioners have selected from the proposed resolution the one statement that can be used to serve their purpose, while they silently by-pass the instructive part of the resolution as adopted by the Convention, which declares that practical considerations inherent in the collective bargaining process will necessitate lower mileage limitations, *and earnings*, in advance of any demand for higher pay rates. We quote from the resolution as follows:

> "We also believe that, to demonstrate sincerity of purpose to reduce mileage limitations to provide a decent work week on one hand for those who are now employed and on the other hand to provide employment opportunities for our younger members, who may soon find themselves unemployed, we must

take a positive stand for lower mileage limitations in both road and yard service.

"We further believe that such lower mileage limitations, and earnings, will be required in advance of any demand for higher pay-rates, as it has been proven, time and time again that the railroads are using excessively high earnings of the few as evidence before wage tribunals in opposition to increased wage rates and that they have been successful in their efforts through such evidence.

"We also recognize that the question of mileage reductions is, and has been, a controversial issue since the early days of the old Chicago Joint Agreement."

The resolution concludes by referring the adopted policy to the Brotherhood's President and the Brotherhood's Association of General Chairmen for further handling (R. 22). The Convention action was followed by formal consideration and decision at a meeting held in Chicago in September, 1955, by the Association of General Chairmen, in which General Chairman Healan participated (R. 228-230).

General Chairman Healan testified to having personal knowledge that agreements reducing the firemen's mileages had been put into effect on the Wheeling & Lake Erie Railroad, the Monon Railroad, Western Maryland Railway, Georgia & Florida Railway, Minnesota & Western Railway, Boston & Albany, and the Elgin, Joliet & Eastern Railway (R. 229).

Even before the adoption by the 1953 Convention of a national policy favoring the lowering of firemen's mileage generally, the Brotherhood's general chairman on the Atlantic Coast Line Railroad authorized the addition of swing men and pool men under circumstances that reduced the average mileage earned to well below the

minimum levels then prescribed by the firemen's agreement. The propriety of this action was challenged by members of the Brotherhood determined to earn the maximum permitted by the agreement, but on August 18, 1954, the highest appellate tribunal within the Brotherhood unanimously affirmed such action by the general chairman when prompted by conditions of unemployment in the firemen's craft (R. 349-352).

The steady contraction of jobs in the railway industry in recent years has received such wide publicity as to have become a fact of common knowledge to all persons concerned with matters of public welfare. Ten years ago there were 1,660,000 jobs in the railway industry. *Fifty percent of those jobs have vanished.* Employment in the railway industry at the time of trial was less than 997,000 persons (R. 215). By August, 1959, employment on Class I railroads had dropped to 819,689. (Monthly Report M-300, Interstate Commerce Commission, Bureau of Transport Economics and Statistics.)

During the same ten-year period, 30,000 firemen's jobs vanished from the railroads (R. 215). These losses are the result of forces that are in addition to the natural attrition that characterizes a diminishing industry. This disappearance of jobs has been accelerated, particularly in the firemen's craft, by the rapid and technological change resulting from the wholesale substitution of multiple-unit Diesel locomotives for the steam locomotive. General Chairman Healan testified:

> "They don't add trains any more, they add locomotive units. Where they used to run, we'll say, three trains, today they run one." (R. 215.).

Of this development, Director of Personnel, W. J. Collins, testified:

"Q. Now, Mr. Collins, from your experience as Director of Personnel I assume you are fairly well apprised of the number of firemen as well as engineers and others, for that matter, on the Central of Georgia. Has there been a downward trend in the number of firemen who actually are working?

A. Well, I don't know. I have never kept any figures or even concerned myself with that because I never had any occasion to, but just off hand I would generally say that they have particularly due to the advent of the Diesel power, because we are hauling in one train today what we used to haul in two or three, seventeen or eighteen cars, something like that, back before we got Diesels, with steam power, why we would have had a couple or about three trains running, and there was a fireman on every train, so there's obliged to have been a downward trend in not only firemen but all railroad employees.

By the Court: Are all of your engines Diesels now?

A. Yes sir, we are completely Dieselized.

Q. Freight and passenger?

A. Yes, sir, everything. We don't have a steam locomotive on the railroad in service, and I don't know if we have one or not." (R. 527).

The employment situation on the Central of Georgia Railway fully reflects the increasing unemployment on a national scale in the railway industry.

During the past 10 years the Central of Georgia Railway has discontinued operation of *24 passenger trains*, including the famous "Southland" (R. 219, 220), and jobs for firemen have shrunk in eight years from 251 to 189 (R. 216).

In order to put before the Court the conditions of unemployment in the firemen's craft on the Central of Georgia Railway as of March 1, 1957, the Brotherhood

added to the evidence adduced in open court the depositions of five unemployed firemen, one from each of the five seniority districts on the Central of Georgia Railway (R. 555). From the Savannah District, T. C. Madison testified that he stood No. 77 on a roster of 97 firemen as of January 1, 1958; that he had had no work during January and February, 1957; and that all firemen below him on the firemen's roster were similarly unemployed. Of the 97 firemen with employment rights on the Savannah District, 21.8% of them were unemployed during a substantial period preceding March 1, 1957.

From the Southwest Seniority District of the Macon Division, J. R. Holt testified that he was the 64th man down on the firemen's roster; that there was a total of 81 men on the roster; and that on January 1, 1947, he and all the firemen below him on the roster were without work. This means that 22.2% of the firemen on this roster were unemployed.

From the Atlanta District W. F. Smith testified to the effect that he was in 74th position from the top of the firemen's roster; that there was a total of 97 firemen on this roster; that he has been continuously unemployed since December 15, 1957; and that during January and February, 1957, 24.7% of the firemen on the Atlanta District were without work.

From the Cedartown Seniority District of the Columbus Division W. E. Fowler, Jr. testified to the effect that he was number 31 on a roster of 48 firemen; that he and 17 firemen below him, or a total of 37.5% of all firemen having employment rights on the Cedartown District were out of employment on March 1, 1957. Fowler added that he has had no regular work as a fireman on the Central of Georgia since 1951—a period of seven years.

The unemployment situation on the district where petitioners are employed fully reflects the general situation. Fireman J. E. Floyd's testimony discloses that he stood 89th down on a roster of 126 names; that during January and February, 1957, he held no regular assignment, was not a member of any pool, that his name was on the extra board only occasionally, and that *37 firemen below him were unemployed.* Thus, 30.1 per cent were unemployed on the district to which the petitioners belong.

Graphic proof of this condition is provided by the payroll records upon which Chart G in the Appendix was constructed. (This Chart is a complete roster of firemen on the Columbus Seniority District except for a few promoted men whose names were omitted from the top because they performed no work as firemen during 1957.)

Adverting to Chart G, the Court will note that the 98th name on this roster is H. E. Crowley; that there is a total of 120 firemen having employment rights on the Columbus Seniority District, and that, with the exception of Firemen Gradic, Dudley, and Morgan, *there was no work whatever available for Crowley and the 21 men below him during the year 1957.* The three exceptions referred to earned but a pittance during 1957.

To this less than sanguine picture of employment conditions in the firemen's craft, must be added a recent development that threatens to virtually eliminate the firemen's craft from the railway industry. Nation-wide publicity by the press and the radio is currently being given to a recent announcement joined in by all of the major railroads in the country to the effect that they intend to achieve in the near future, through collective bargaining, the elimination of the fireman from all freight train crews and all switching crews operated by these railroads.

The Reason Stated by Petitioners for Granting the Writ.

The petitioners make the following statement at page 13 of their petition:

> "Petitioners are the victims of an ugly system of racial discrimination in the exercise of the all-white Brotherhood's exclusive statutory bargaining power."

If the only evidence contributed by the defendants to the record before this Court consisted of Chart A, a description of all of the trains regularly operated on the Central of Georgia Railway, with the mileage that each fireman assigned to these trains will normally earn; and Charts B to H, which summarize the information provided by the carrier's payroll records on the Columbus Seniority District, this evidence standing alone should refute the petitioners' contention that the reduction of their mileage effected on March 6, 1957, constituted discriminatory treatment of a hostile character prompted by racial considerations. The payroll information summarized by Charts B to H establishes beyond dispute that the petitioners continue, notwithstanding the March 1, 1957, lowering of firemen's mileage limitations, to enjoy the peak earnings positions on their seniority district.

What the petitioners are in fact contending for in this proceeding is that their earnings may not lawfully be reduced below the *maximum* specified by the firemen's mileage rules because of the circumstance that they occupy senior positions on the firemen's roster while white firemen predominate in the lower positions of the roster. The existence of this circumstance means that any reduction of the petitioners' mileage is reasonably certain to result, at least ultimately, in the creation of jobs for unemployed *white* firemen at the lower end of the seniority roster.

This is the petitioners' case for racial discrimination.

The statement by the petitioners at page 13 of their petition for certiorari that the findings and judgments rendered by the courts below disregard the decision by this Court in the *Steele* case would be an irrelevance even were it true. This is the case because the only issue decided by the courts below was whether the agreement to reduce the minimum mileage limitations effective March 1, 1957, on the Central of Georgia Railway and its enforcement was forbidden *by the terms of the March 25, 1952, injunction*: If the mileage reduction experienced on and after March 1, 1957, by the petitioners, under the circumstances disclosed by the record, was not forbidden by the language of the injunction, then surely the contempt proceeding should be at an end.

If the judgment entered by the Court of Appeals is brought by certiorari to this Court for review, it seems to the respondent that the only question that will be open for consideration by this Court will be this, to-wit: Are the findings that were concurred in by the courts below so clearly erroneous that the judgment entered below must be reversed, and new findings supporting the petitioners' contention be made by this Court?

Respectfully submitted,

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December 31, 1959.

APPENDIX A. THE CHARTS

CHART A

SUMMARY OF CENTRAL OF GEORGIA
"AVERAGE" FREIGHT TRAIN ASSIGNMENTS

Item No.	Train No.	Terminals	Class of Service	1st 15 days, April, 1957 Crews	1st 15 days, April, 1957 Mileage	1st 15 days, Jan., 1958 Crews	1st 15 days, Jan., 1958 Mileage
3	80 & 81	Eufaula—Union Springs, Ala.	local freight	1 white	1,300	1 white	1,300
4	75, 76 49 & 50	Eufaula—Ozark, Ala. and Eufaula, Ala.—Fort Gaines, Ga.	local freight	1 colored	1,420	1 white	1,460
5	81 & 82	Columbus, Ga.—Sylacauga, Ala.	local freight	2 white	1,332 1,332	2 white	1,333 1,332
6	35 & 46	Columbus, Ga.—Birmingham, Ala.	Pool freight	3 White	1,564 1,728 1,670	3 white	1,808 1,570 1,884
7	44 & 29	Cedartown—Griffin, Ga. and Chattanooga, Tenn.	Pool freight	3 colored 1 white	1,516 1,514 1,514 1,514	4 colored	1,514 1,516 1,516 1,514
8	35, 42, 29, 34, 57 & 58	Macon, Columbus & Albany, Ga.	Pool freight	3 white 2 colored	1,670 1,428 1,338 1,866 1,552	4 white 1 colored	1,824 1,854 1,676 1,640 1,536
10	Gordon Switch Local	Operates out of Macon, Ga. on Savannah Division	local freight	2 white	1,300 1,300	2 white	1,300 1,300
11	46 & 49	Macon—Augusta, Ga.	Pool freight	1 white 2 colored	1,332 1,705 1,705	1 white 2 colored	1,705 1,532 1,705

(Continued on next page)

CHART A (Continued)

SUMMARY OF CENTRAL OF GEORGIA "AVERAGE" FREIGHT TRAIN ASSIGNMENTS

Item No.	Train No.	Terminals	Class of Service	1st 15 days, April, 1957 Crews	1st 15 days, April, 1957 Mileage	1st 15 days, Jan., 1958 Crews	1st 15 days, Jan., 1958 Mileage
12	70 & 71	Macon—Porterdale, Ga.	local freight	1 white	1,468	2 white	1,582 1,356
13	77 & 78	Macon—Athens, Ga.	pool freight	2 colored	1,776 1,554	2 colored	1,776 1,554
15	30 & 65	Albany—Columbus, Ga.	through freight	1 colored 1 white	1,600 1,400	1 colored 1 white	1,600 1,400
16	Americus Switch Local	Albany—Americus, Ga.	local freight	1 white	1,300	1 white	1,300
17	99 & 100	Albany, Ga.—Dothan, Ala.	local freight	1 colored 1 white	1,600 1,400	1 colored 1 white	1,600 1,400
18	Mary Lee No. 1	Birmingham—Vinson, Ala.	local freight	1 white	1,300	1 white	1,300
18	Mary Lee No. 2	Birmingham—Vinson, Ala.	local freight	1 white	1,300	1 white	1,300
19	40 & 41	Columbus—Albany, Ga.	local freight	2 white	1,400 1,200	2 white	1,200 1,200
20	71 & 40	Columbus—Montgomery, Ala.	local freight			1 white 1 colored	1,400 1,600
21	95 & 96	Macon—Tenville, Ga.	local freight	1 white	1,573	1 white	1,573

(Continued on next page)

CHART A (Continued)

SUMMARY OF CENTRAL OF GEORGIA
"AVERAGE" FREIGHT TRAIN ASSIGNMENTS

Item No.	Train No.	Terminals	Class of Service	1st 15 days, April, 1957 Crews	1st 15 days, April, 1957 Mileage	1st 15 days, Jan., 1958 Crews	1st 15 days, Jan., 1958 Mileage
22	99 & 100	Cedartown, Ga.—Chattanooga, Tenn.	local freight	1 colored	1,300	1 white	1,300
23	97 & 98	Cedartown—Griffin, Ga.	local freight	1 colored	1,326	1 white	1,326
24	Sylacauga Switch Local	Out of Sylacauga	local freight	1 white	1,300	1 white	1,300
26	Fort Valley Switch Local		local freight	1 white	1,300	1 white	1,300
29	29, 39 47 & [illegible]	Macon—Atlanta, Ga.	pool freight	2 white 3 colored	1,738 1,812 1,732 1,632 1,836	2 white 3 colored	1,632 1,632 1,480 1,632 1,632
31	Coosa Pines Switch Local	Birmingham—Trammells, Ala.	local freight	1 white	1,614		
32	91 & 92	Savannah, Metter & Millen	local freight	1 white	2,034	1 white	1,864
			Average		1,518		1,512

CHART A (Continued)

SUMMARY OF CENTRAL OF GEORGIA
"AVERAGE" PASSENGER TRAIN ASSIGNMENTS

Item No.	Train No.	Terminals	Class of Service	1st 15 days, April, 1957 Crews	1st 15 days, April, 1957 Mileage	1st 15 days, Jan., 1958 Crews	1st 15 days, Jan., 1958 Mileage
1	33, 32 17 & 18	Macon—Albany, Ga.	passenger pool	3 colored	2,130	1 white	1,597
					2,130	1 colored	1,597
					2,130		
2	108, 4, 18 & 32	Macon—Atlanta, Ga.	passenger pool	6 colored	1,030		
					1,030		
					1,030		
					1,030		
					1,030		
					1,030		
9	107, 3, 4 & 108	Savannah—Macon, Ga.	passenger assignments	5 colored	1,719	5 colored	2,101
					1,337		2,101
					2,483		1,910
					2,483		1,910
					1,528		1,910
14	52 & 53	Columbus—Albany, Ga.	local passenger	1 white	1,500	1 colored	1,500
25	9 & 10	Columbus—Albany, Ga.	passenger	2 white	1,500	2 white	1,500
					1,500		1,500
27	19 & 20	Columbus—Atlanta, Ga.	passenger	2 white	1,755	2 white	1,755
					1,755		1,755
30	3, 4, 107 & 108	Swing man on regular assigned passenger and freight trains between Macon, Savannah and Millen		1 colored	1,910	1 white	1,910
			Average		1,602		1,772

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CHART A (Continued)

EXTRAORDINARY TRAIN ASSIGNMENTS

Item. No.	Train No.	Terminals	Class of Service	1st 15 days, April, 1957 Crews	1st 15 days, April, 1957 Mileage	1st 15 days, Jan., 1958 Crews	1st 15 days, Jan., 1958 Mileage
1	85 & 86	Macon, Ga.—Eufaula, Alabama	local	2 white	1,877	1 white	1,887
			freight		1,880	1 colored	1,883
2	29 & 34	Savannah—Macon, Ga.	assigned	3 colored	1,768	3 colored	1,965
			through		1,768		1,768
			freight		1,572		1,572
3	95 & 96	Union Springs—Andusilia, Ala.	local	1 colored	2,184	1 colored	2,184
			freight				
4	89 & 90	Cedartown—Columbus, Ga.	local	2 colored	1,891	2 colored	2,037
			freight		1,891		2,037
			Average		1,854		1,917
5	10 & 53	Columbus, Ga.—Birmingham, Ala.	assigned	3 colored	2,184	3 colored	2,416
			passenger		2,114		2,265
					2,114		2,114
6	3, 17 & 107	Atlanta—Macon, Ga.	passenger			4 colored	2,266
			pool				2,266
							2,472
							2,266
			Average		2,137		2,295

CHART B

CENTRAL OF GEORGIA RAILWAY
COLUMBUS DIVISION—COLUMBUS AND CEDARTOWN SENIORITY DISTRICTS

Record of Mileage or Hours and Pay of Colored Locomotive Firemen for the Months of July and December, 1956

NAME	Seniority No. Cedartown District Rd.	Yd.	Columbus Dist	Mileage or Hours and Pay Inc. Overtime and Constructive Allowances JULY Miles or Hrs	Pay	DECEMBER Miles or Hrs.	Pay
Alexander. W.			49	4003	673.08	3341	580.80
Carearthers. G.	5	3		2961	498.06	4744	795.19
Careathers. R. H.	4	2				1829	306.16
Covington. W.			40	3839	630.41	3798	697.97
Davis. A.	2			3553	550.09	2990	492.06
Greer. O.			32	3040	482.44	3128	521.43
Griffin. P. E.			22	3625	628.55	3699	635.82
Hammond. O.			5	3223	511.66	3093	515.59
Hinkle. A. O.	6	4		1354	230.22	2544	452.33
Mack. H.			19	2708	429.75	2394	399.92
Mark. E.			31	3789	647.79	3963	670.10
Marshall. A.			34	3096	502.05	3978	719.26
McAdory. K. S.			11	4324	627.83	4578	711.38
Mullins. J.			23	3633	635.48	3640	659.13
Nelson. T. Jr.	3			2364	404.55	2668	480.66
Rivers. J. W.			41	3058	530.05	3306	594.80
Simpson. M.			21	3779	657.21	3680	664.54
Smith. H.			16	5524	948.54	3816	694.37
Smith. J. Jr.			7	3482	529.43		
Vincent. M.			48	2709	417.01	3791	701.84
Warren. Z.			50	4065	647.89	4367	736.73
Williams. F. W.	1			3014	517.24	2994	538.50

CHART C

Page 1 of Chart C

CENTRAL OF GEORGIA RAILWAY
COLUMBUS DIVISION—COLUMBUS AND CEDARTOWN SENIORITY DISTRICTS

Record of Mileage or Hours and Pay of White Locomotive Firemen for the Months of July and December, 1956

NAME	Seniority No.			Mileage or Hours and Pay Inc. Overtime and Constructive Allowances			
	Cedartown District		Columbus Dist	JULY		DECEMBER	
	Rd.	Yd.		Miles or Hrs.	Pay	Miles or Hrs.	Pay
Addison, B. J.	37	32	....	1699	279.28	2726	455.92
Addison, M. D.	32	26	....	.....	.....	1055	174.50
Avant, T. O.	....	....	96	400	63.48	.....	.....
Batastini, P. W. Jr.	....	....	92	3216	506.58	490	80.33
Belk, J. W.	....	....	63	3702	440.20	3288	501.63
Bentley, C. H.	....	....	....	1243	194.43	.....	.....
Black, A.	....	....	....	2637	452.62	2845	501.41
Boss, H. R.	....	....	80	2838	450.38	1731	288.55
Blythe, A. H.	39	34	....	.....	.....	3077	530.72
Bremer, H. F.	....	....	65	1625	256.98	1892	316.03
Bowden, E. M.	31	25	....	.....	.....	2418	430.73
Brittingham, E. R.	....	....	88	2869	449.61	1920	319.85
Brookins, W. L.	....	....	94	1267	197.08	.....	.....
Bryant, W. S. Jr.	....	....	77	2900	451.82	2040	336.52
Butler, C. H.	....	....	....	2000	467.40	1600	318.00
Cannon, E. C. Jr.	....	....	69	3308	534.33	1549	251.88
Carter, B. J.	26	19	....	2497	435.66	3537	596.57
Corbin, W. C.	....	....	86	2065	327.71	2661	448.75
Covey, T. P.	25	18	....	2768	453.73	1963	340.81
Cowan, E. S.	....	....	....	.....	.....	100	15.73
Crowley, G. D. Jr.	....	....	117	.....	.....	300	50.01
Cunningham, W. B.	....	....	....	.....	.....	351	45.19

CENTRAL OF GEORGIA RAILWAY

Page 2 of Chart C

(Continued)

NAME	Seniority No. Cedartown District Rd.	Yd.	Columbus Dist	Mileage or Hours and Pay Inc. Overtime and Constructive Allowances JULY Miles or Hrs.	Pay	DECEMBER Miles or Hrs.	Pay
Daniel, J. W.	13	14	....	3180	506.08	3163	511.77
Dobbs, R. L.			90	3878	600.70	2157	352.30
Dudley, J. L.			82	2744	456.35	2271	384.63
Eiland, H. O.			93	3049	472.11	498	83.01
Ellington, J. R.			79	1330	216.42	1962	318.47
Gable, R. B. Jr.			59			1694	292.31
Gever, A. Jr.			91	2844	445.37	505	84.31
Gradic, C. A.			99	2834	417.38		
Green, D. H.			61			1215	202.53
Hart, H. G. Jr.			67	468	66.73	2790	426.77
Hartley, J. T.						400	62.92
Hayes, J. H.						400	62.10
Hinson, J. J.						2686	452.74
Holland, J. S.	18	8		450	71.41		
Kittel, J. P.			104	2066	329.51		
Landrum, J. O.			66	2734	423.79	1630	271.71
Lewis, W. S.				4123	599.98	4513	701.28
Lloyd, J. E. Jr.			83	2207	344.59	2824	472.32
Maxwell, C. M. Jr.			68	697	114.71	3210	522.99
McHargue, W. D.			95	200	31.74		
McKoon, J. F.				204	32.37		
McQuinn, V. M.			74			2236	363.29
McRae, A. L.			72	1748	277.44	2701	449.09
Morgan, J. W.			108	310	45.02		

(Continued on next page)

CENTRAL OF GEORGIA RAILWAY

Page 3 of Chart C

(Cohtinued)

NAME	Seniority No.			Mileage or Hours and Pay Inc. Overtime and Constructive Allowances			
	Cedartown District		Columbus Dist	JULY		DECEMBER	
	Rd.	Yd.		Miles or Hrs.	Pay	Miles or Hrs.	Pay
Murphy, T. J.	....	....	62	617	102.56	1989	341.24
Nash, R. E.	....	....	75	3135	517.64	3082	519.77
Nickerson, L. B. Jr.	....	....	81	.....	.....	1418	240.30
Nickerson, L. B.	....	....	60	40	6.49	2796	453.17
Perkins, J. W.	28	21	....	3197	512.64	2198	372.68
Powell, C. J.	22	22	....	4527	712.19	1343	239.61
Raley, L. L.	....	....	76	2211	351.12	3704	596.39
Ramsey, F. R.	....	....	84	2943	473.98	2825	465.41
Ray, L. H.	....	....	70	2266	347.41	2538	428.22
Reeves, W. A.	20	9	....	3917	623.57	408	66.05
Richey, L. W.	....	....	78	3515	580.65	3072	544.54
Riddle, W. R.	....	....	87	3024	480.46	2337	357.63
Roberson, H. T.	....	....	....	2723	434.58	.....	.....
Roberson, W. M.	29	23	....	2721	440.03	2071	338.94
Roberts, E. P.	....	....	97	2999	446.25	100	16.38
Smith, J. M.	....	....	73	2871	455.13	2831	468.17
Stephens, H. Y.	....	17	....	1919	322.56	2264	390.29
Tracey, J. F.	21	....	....	2700	438.59	919	172.03
Turner, C. G.	....	....	89	3316	526.59	2019	336.35
West, E. M.	....	....	64	3318	572.97	2240	373.40
Williams, C.	23	15	....	3462	569.54	2962	499.94
Williams, J. H.	27	20	....	2422	407.10	2932	492.40
Williams, R. C.	....	....	85	2042	321.13	3128	496.85
Wilson, A. M. Jr.	19	11	....	1591	252.48	1417	236.20
~~Wood, J. H.~~	38	33	....	.....	.....	2234	387.52
Wren, E. R.	....	....	71	3645	577.73	5430	893.46

CHART D

CENTRAL OF GEORGIA RAILWAY

COLUMBUS DIVISION—COLUMBUS SENIORITY DISTRICT

COMPENSATION OF COLORED LOCOMOTIVE FIREMEN FOR THE YEAR 1957

Name	Seniority Number	Compensation
Hammond, Ollie	5	$6.315.86
Smith, John Jr.	7	4.129.57
McAdory, K.	11	8.037.37
Smith, Henry	16	7.723.29
Mack, Homer	19	5.711.49
Simpson, Major	21	7.410.72
Griffin, Percy	22	7.792.07
Mullins, Jim	23	7.530.65
Mark, Emmett	31	7.642.96
Greer, Ollie	32	5.878.70
Marshall, Al	34	7.236.11
Covington, Will	40	7.604.73
Rivers, Jno. W.	41	7.853.32
Vinçent, Marion	48	7.245.23
Alexander, Walter	49	7.342.58
Warren, Zack	50	8.001.18

CHART E

Page 1 of Chart E

CENTRAL OF GEORGIA RAILWAY
COLUMBUS DIVISION—COLUMBUS AND CEDARTOWN SENIORITY DISTRICTS

Record of Mileage or Hours and Pay of White Locomotive Firemen Including Pay as Locomotive Engineer and or Hostler During the Year 1957

NAME	Seniority No.			Miles or Hours and Pay Inc. Overtime and Constructive Allowances				
	Cedartown Dist.		Columbus Dis	Miles or Hrs	Pay as Fire'n	Other Pay Hostler	Other Pay Engin'r	Total Annual Pay
	Rd	Yd			$	$	$	$
Adams, W. E.				429	79.22			79.22
Addison, B. J.	37	32		8,473	1510.71	17.57		1528.28
Addison, M. D.	32	25		3,958	700.23			700.23
Avant, T. O.			96	7,142	1288.11	292.15		1580.26
Batastini, P. W. Jr.			92	22,753	3876.34	450.02		4326.86
Belk, J. W.			63	32,109	5043.20		981.16	6024.36
Black, A.				10,964	1973.28			1973.28
Blythe, A. H.	39	34		6,945	1245.08			1245.08
Boss, H. R.			89	25,131	4268.71	795.36	708.53	5772.60
Bowden, E. M.	31	25		14,199	2553.24	132.77		2686.01
Brewer, H. F.			65	28,246	4913.25	1130.79	822.63	6866.70
Brittingham, E. R.			88	27,021	4708.60	704.06		5412.66
Brookins, W. L.			94	21,197	3675.85	449.34		4125.19
Bryant, W. S. Jr.			77	31,180	5332.13	325.63	183.24	5841.00
Burke, W. Jr.			46	3,497	648.34		7907.46	8557.79
Butler, C. H.				2,368	387.99			387.99
Cannon, E. C. Jr.			69	12,152	2173.28	3857.22	773.10	6803.60
Carter, B. J.	26	19		23,226	4062.09	166.21	1102.20	5330.50
Corbin, W. C.			86	27,592	4736.40			4736.40
Covey, T. F.	25	18		20,254	3498.76	266.76	1766.79	5532.31
Cowan, E. S.				4,313	680.01			680.01
Cox, C. H.				220	42.11			42.11
Crowley, G. D.			117	100	16.67			16.67
Cruse, D. R.	16	31		10,310	1794.22		4482.69	6276.91
Cunningham, W. B.				104	19.20			19.20
Daniels, J. W.	13	14		37,203	6532.42			6532.42
Daugherty, R. R.				211	38.96			38.96
Daugherty, J. L.			54	4,484	793.44		5736.19	6529.63
Dobbs, R. L.			90	28,594	4826.38	505.33	22.30	5354.01
Dudley, J. L.			82	27,473	4714.05	658.64	61.27	5433.96
Dudley, J. M.			100	200	33.82	16.00		49.82
Duke, W. C.				406	66.17			66.17
Eiland, H. O.			93	25,210	4321.52	738.61		5060.13
Ellington, J. R.			79	18,019	3334.72	89.29	61.21	3485.22
Gable, R. [illegible] Jr.			59	28,226	4983.58		2873.71	7857.29

(Continued on next page

CENTRAL OF GEORGIA RAILWAY

Page 2 of Chart F (Continued)

NAME	Seniority No.			Miles or Hours and Pay Inc. Overtime and Constructive Allowances		Other Pay		
	Cedartown Dist. Rd	Yd	Columbus Dis	Miles or Hrs	Pay as Fire'n $	Hostler $	Engin'r $	Total Annual Pay $
Geyer, A. Jr.			91	21,331	3722.23	628.21		4350.44
Gradic, C. A. Jr.			99	2,073	340.89	55.66		396.55
Green, D. H.			61	24,084	4335.89	161.18	2880.98	7378.05
Hall, O. C.				100	16.93			16.93
Hart, H. G. J.			67	3,3339	5276.45	513.16	696.85	6486.46
Hartley, J. T.				1,106	185.88		64.41	250.29
Hatcher, P. L.				200	33.86			33.86
Hinson, J. J.				464	97.54			97.54
Holland, J. S. Jr.	18	8		26,146	4753.79		2530.65	7284.44
Holt, J. R.				100	16.93			16.93
Jackson, T.				602	108.77			108.77
Jones, D. P.				100	16.93			16.93
Landrum, J. O.			66	17,955	3153.78	1302.46	2924.02	7380.25
Lewis, W. S.				11,954	1870.23			1870.23
Lloyd, J. E. Jr.			83		5034.71	392.23	189.10	5616.64
Massey, W. D.			53	6,998	1151.49		5675.19	6826.68
Maxwell, C. M. Jr.			68	24,163	4187.46	600.05	2562.90	7350.41
McHargue, W. D.			95	9,976	1760.53	300.09		2060.62
McLendon, J. K.	17	10		12,621	2163.04	647.56	2087.14	4897.74
McQuinn, V.			74	27,002	4645.57	43.41	593.29	5282.27
McRae, A. L.			72	26,953	5175.38	489.86	625.43	6290.67
Morgan, J. W.			108	3,266	570.88			570.88
Murphy, T. J.			62	18,814	3126.14	1188.52	2881.77	7196.43
Nash, R. E.			75	27,616	4749.59	426.98	1686.52	6863.09
Neal, F. T.	14	16		5,036	925.39	229.38	4852.89	6007.66
Nickerson, L. B. Jr.			60	27,305	5036.79		1806.48	6843.27
Nickerson, L. B.			84	22,771	3845.27	93.67	961.01	4899.95
Morgan, R. W.				200	31.01			31.01
Norris, E. L.				400	63.71			63.71
Perkins, J. W.	28	21		19,598	3473.10	143.45		3616.55

(Continued on Next Page)

CENTRAL OF GEORGIA RAILWAY

Page 3 of Chart F

(Continued)

NAME	Seniority No.			Miles or Hours and Pay Inc. Overtime and Constructive Allowances				
	Cedar Dist.		Co lun			Other Pay		Total Annual Pay
	Rd	Yd	Dis	Miles or Hrs	Pay as Fire'n $	Host. $	Engin. $	$
Pilgrim, J. C.			55	10,858	1965.52		4749.59	6715.11
Powell, C. J.	22	22		17,853	3156.52	364.08	1540.95	5061.55
Proctor, J. W.				100	16.93			16.93
Raley, J. H.			52	4,386	775.39		6931.40	7706.79
Raley, L. L.			76	40,142	6691.32	36.00	495.71	7223.03
Ramsey, F. R.			84	28,702	4995.85	947.95	170.54	6114.34
Ray, L. H.			70	34,535	5845.80	787.13	104.15	6737.08
Reeves, W. A.	20	9		28,788	4925.20	427.02	1315.17	6665.39
Reed, W. J.				100	15.32			15.32
Richey, L. W.			78	26,294	4536.63			4536.63
Riddle, W. R.			87	29,515	5039.63	971.62		6011.25
Roberson, W. M.	29	23		10,148	1801.82	106.00		1907.82
Roberts, E. P.			97	14,898	2631.42	-321.52		2952.94
Smith, J. M.			73	34,829	6048.01	290.82	763.34	7102.17
Stephens, H. Y.	24	17		17,572	3088.62	458.08	1074.63	4621.33
Stephens, R. L. Jr.	10			574	102.91	1061.18	3322.42	4486.52
Tracey, J. F.	21	12		24,532	4253.15	1100.60	1202.90	6556.65
Turner, C. G.			89	23,820	3973.97	230.53		4204.50
Upchurch, R. L.			58	8,980	1675.76	988.20	4125.64	6789.60
Waldrop, R. F.			51	1,351	243.11		6514.09	6757.20
West, E. M.			64	23,095	3919.33		2489.94	6409.27
White, W. L.				300	51.03			51.03
Williams, G.	23	15		25,401	4440.18	1103.27	892.66	6436.11
Williams, J. H.	27	20		15,230	2636.78	346.42	601.78	3584.98
Williams, R. C.			85	30,480	5265.69	652.26	63.08	5981.03
Wilson, A. M. Jr.	19	11		13,803	2349.85	479.31	2130.05	4959.21
Wood, J. H.	38	33		4,302	727.03			727.03
Wren, E. R.			71	45,352	7701.79			7701.79

CHART F

CENTRAL OF GEORGIA RAILWAY

COLUMBUS DIVISION—COLUMBUS SENIORITY DISTRICT

Comparative Table
Compensation of Certain Locomotive Firemen
For the Year 1957

COLORED FIREMEN			WHITE FIREMEN		
Name	Seniority No.	Compensation	Name	Seniority No.	Compensation
Hammond, Ollie	5	$6,315.86	Burke, W. Jr.	46	$8,537.79
Smith, John Jr.	7	4,129.57	Waldrop, R. F.	51	6,757.20
McAdory, K.	11	8,037.37	Raley, J. H.	52	7,706.79
Smith, Henry	16	7,723.29	Massey, W. D.	53	6,826.68
Mack, Homer	19	5,711.49	Daugherty, J. L. Jr.	54	6,529.63
Simpson, Major	21	7,410.72	Pilgrem, J. C.	55	6,715.14
Griffin, Percy	22	7,792.07	Upchurch, R. L.	58	6,789.60
Mullins, Jim	23	7,530.65	Gable, R. B. Jr.	59	7,857.29
Mark, Emmett	31	7,642.96	Nickerson, L. B. Jr.	60	6,843.27
Greer, Ollie	32	5,878.70	Greene, D. H.	61	7,278.05
Marshall, Al	34	7,236.11	Murphy, T. J.	62	7,196.43
Covington, Will	40	7,604.73	Belk, J. W.	63	6,024.36
Rivers, Jno. W.	41	7,853.32	West, E. M.	64	6,409.27
Vincent, Marion	48	7,245.23	Bremer, H. F.	65	6,866.70
Alexander, Walter	49	7,342.58	Landrum, J. O.	66	7,380.25
Warren, Zack	50	8,001.18	Hart, H. G. Jr.	67	6,486.46
Average		7,090.99	Average		7,020.31

(a) Includes compensation received as locomotive engineer and/or hostler.

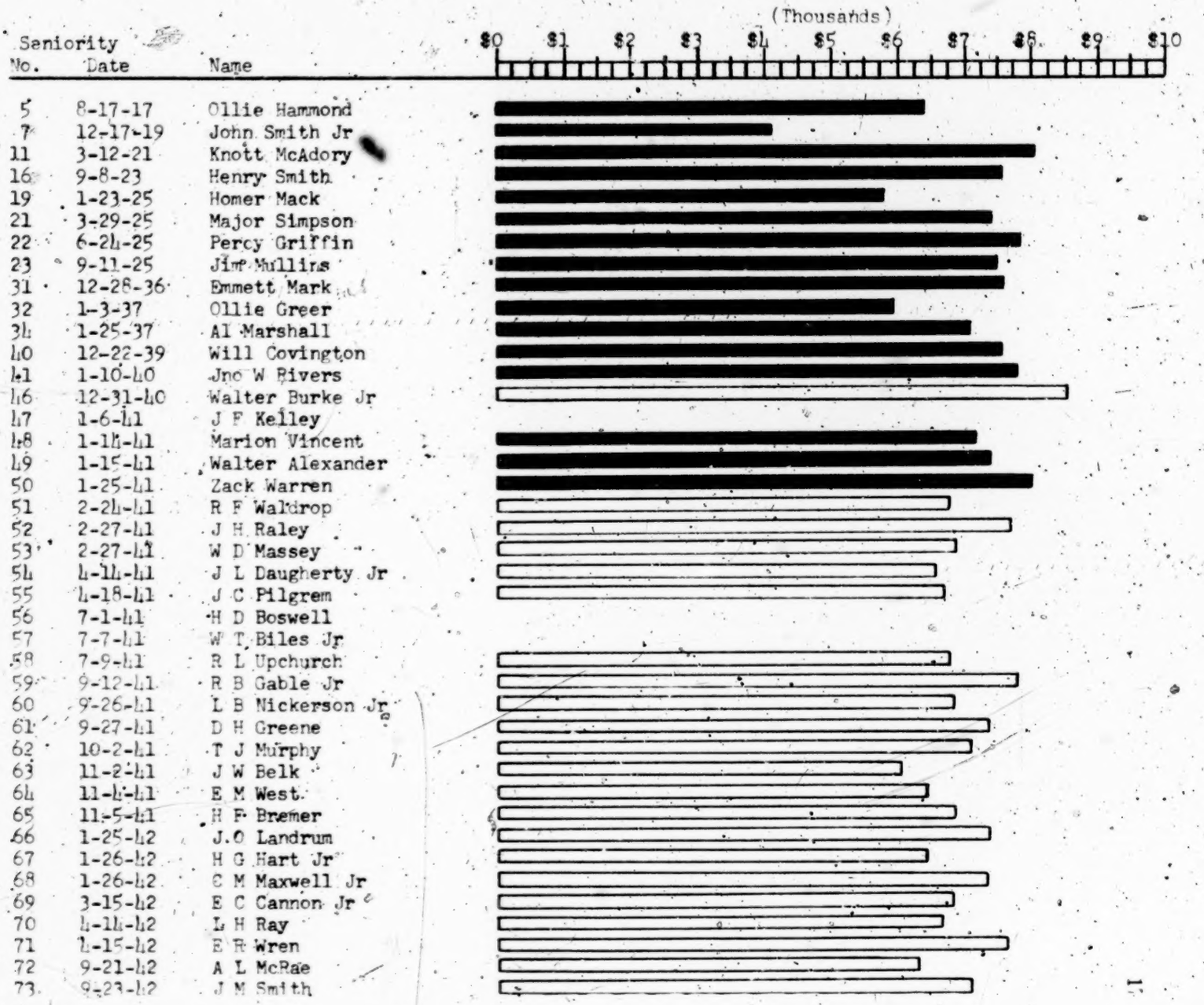
Average compensation of white firemen, employed and furloughed, on Columbus Seniority District, for year 1957 $3,950.28

CHART G

CENTRAL OF GEORGIA RAILWAY

COLUMBUS DIVISION - COLUMBUS SENIORITY DISTRICT

Graphic Illustration of Total Compensation Paid Locomotive Firemen
Including Compensation Paid as Locomotive Engineer and/or Hostler
During the Year 1957



Seniority No.	Date	Name
5	8-17-17	Ollie Hammond
7	12-17-19	John Smith Jr
11	3-12-21	Knott McAdory
16	9-8-23	Henry Smith
19	1-23-25	Homer Mack
21	3-29-25	Major Simpson
22	6-24-25	Percy Griffin
23	9-11-25	Jim Mullins
31	12-28-36	Emmett Mark
32	1-3-37	Ollie Greer
34	1-25-37	Al Marshall
40	12-22-39	Will Covington
41	1-10-40	Jno W Rivers
46	12-31-40	Walter Burke Jr
47	1-6-41	J F Kelley
48	1-14-41	Marion Vincent
49	1-15-41	Walter Alexander
50	1-25-41	Zack Warren
51	2-24-41	R F Waldrop
52	2-27-41	J H Raley
53	2-27-41	W D Massey
54	4-14-41	J L Daugherty Jr
55	4-18-41	J C Pilgrem
56	7-1-41	H D Boswell
57	7-7-41	W T Biles Jr
58	7-9-41	R L Upchurch
59	9-12-41	R B Gable Jr
60	9-26-41	L B Nickerson Jr
61	9-27-41	D H Greene
62	10-2-41	T J Murphy
63	11-2-41	J W Belk
64	11-4-41	E M West
65	11-5-41	H F Bremer
66	1-25-42	J O Landrum
67	1-26-42	H G Hart Jr
68	1-26-42	C M Maxwell Jr
69	3-15-42	E C Cannon Jr
70	4-14-42	L H Ray
71	4-15-42	E R Wren
72	9-21-42	A L McRae
73	9-23-42	J M Smith

55	4-18-41	J C Pilgrem
56	7-1-41	H D Boswell
57	7-7-41	W T Biles Jr
58	7-9-41	R L Upchurch
59	9-12-41	R B Gable Jr
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70	4-14-42	L H Ray
71	4-15-42	E R Wren
72	9-21-42	A L McRae
73	9-23-42	J M Smith
74	9-25-42	V M McQuinn
75	10-18-42	R E Nash
76	10-24-42	L L Raley
77	11-2-42	W S Bryant
78	11-30-42	L W Richey
79	12-15-42	J R Ellington
80	3-22-43	H R Boss
81	3-25-43	L B Nickerson
82	4-11-43	J L Dudley
83	5-10-43	J E Lloyd
84	5-13-43	F R Ramsey
85	9-2-43	R C Williams
86	10-30-43	W C Corbin
87	12-2-43	W R Riddle
88	1-12-44	E R Brittingham
89	1-20-44	C G Turner
90	2-21-44	R L Dobbs
91	3-20-44	Albert Geyer Jr

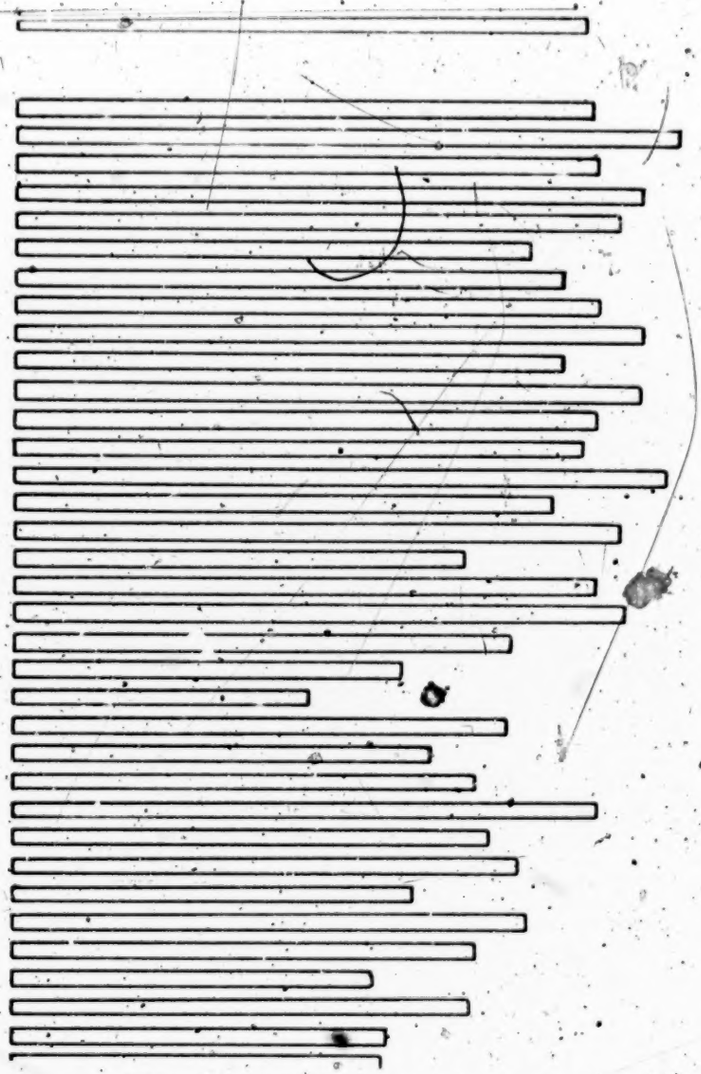

CHART H

COMPARISON OF PETITIONERS' EARNINGS AND DEMOTED FIREMEN'S EARNINGS

	Earnings 1957
Marshall	$7,236.11
Simpson	7,410.72
Covington	7,604.73
Mullins	7,530.65
Vincent	7,245.23
Average Earnings	$7,405.50

1957 earnings of three enginemen referred to in the testimony given by Major Simpson:

Seniority No.			
58	R. L. Upchurch	Fireman	$1,675.76
		Engineman	4,125.64
		Hostler	988.20
	TOTAL		$6,789.60
59	R. B. Gable	Fireman	$4,983.58
		Engineer	2,873.71
	TOTAL		$7,857.29
62	Jack Murphy	Fireman	$3,126.14
		Engineer	2,881.77
		Hostler	1,188.52
	TOTAL		$7,196.43

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 542

AL MARSHALL, ET AL.,

Petitioners,

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, ET AL.,

Respondents.

REPLY MEMORANDUM FOR PETITIONERS

JOSEPH L. RAUH, JR.,
JOHN SHARD,
1631 K Street, N.W.,
Washington 6, D. C.
Attorneys for Petitioners.

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(1) This case presents the important question whether, consistent with an injunction issued under the *Steele* doctrine, an all-white Brotherhood may expropriate traditional mileage and pay of excluded senior Negro firemen for the benefit of junior white Brotherhood members. In urging this Court's review, petitioners pointed out (i) that the respondent Brotherhood denies Negro firemen the right to membership (Pet. pp. 6, 10), (ii) that the taking of the mileage and pay of Negro firemen was accomplished without any prior notice or hearing to them (Pet. pp. 6, 14), (iii) that only Negro firemen have suffered from the introduction of a swing man (Pet. p. 7), and (iv) that only white firemen have benefited therefrom (Pet. p. 8). Respond-

ents' Opposition nowhere challenges a single one of these four essential facts. We respectfully submit that, when an all-white union takes mileage and pay from Negroes alone for the benefit of whites alone, without so much as notice and hearing to the affected Negroes and in utter derogation of their seniority rights, the case for review has been made. See *Steele* v. *Louisville & Nashville R. Co.*, 323 U.S. 192 at 204; Pet. p. 14.

(2) Unable and unwilling to meet the Petition in any way, respondents' Opposition indulges in studied factual complexity and legal avoidance. Certainly the "Facts Bearing Upon Petitioners' Charge of Racial Discrimination," which comprise the bulk of the Opposition (pp. 13-32), are in no sense responsive to the question whether the white Brotherhood may take the traditional mileage and pay of senior Negroes and give it to its junior white members. In this section of its Opposition the Brotherhood refers the Court to a number of charts and tables and in particular to a chart of train assignments on the Central of Georgia. But respondents nowhere attempt to relate these charts and tables to the question at issue. Indeed all these charts and figures were offered to the District Court, which found them irrelevant to the question presented concerning the introduction of a swing man who reduces petitioners' mileage and pay.

The Opposition goes on (pp. 24-26) to characterize as a "wholly mistaken concept" petitioners' contention that, unlike Negro firemen relegated to firing assignments, white firemen are regularly permitted to supplement their pay by working as engineers and hostlers:

> "The contention that white employees, after completing a month's work as firemen, regularly augment their earnings as firemen by taking jobs as engineers or hostlers during the remainder of the

month is completely dissipated by the payroll records disclosing the earnings in each class of service of the white firemen employed on the Columbus Seniority District, reproduced in Chart E of the Appendix" (Op. p. 25).

We have done exactly what the Brotherhood suggests—examined Chart E of the Appendix to the Opposition—and we find that it fully *substantiates* our contention that practically every regularly employed white fireman is permitted to supplement his firing pay by working concurrently as a hostler or engineer. Our addition of the "hostler" and "engineer" pay columns shown in that Brotherhood chart, reveals that while not a single Negro fireman can earn an additional dollar in non-firing capacities, 65 white firemen earned a total of $127,472.38 above their firing pay through exercise of dual seniorities in 1957!

In a word, the bulk of respondents' Opposition—"Facts Bearing Upon Petitioners' Charge of Racial Discrimination"—is irrelevant matter not relied upon by the courts below and intended to give the case an aura of factual complexity which does not exist; in the only area where the Opposition does seek to meet the Petition—on the question of dual seniorities of white firemen—the Opposition is patently erroneous as indicated in the previous paragraph.

(3) Respondents conclude their "factual" material (Op. pp. 29-32) by reference to alleged increases in unemployment among firemen in recent years, which presumably justifies taking the mileage and pay of senior Negroes and giving it to unemployed or underemployed junior white firemen. In our view, reduction in available work for firemen on the Columbus Division could not in any event justify the Brotherhood's selective taking of the mileage and pay of the most senior Negro firemen to distribute it among white firemen: it is after all precisely the significance

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of seniority that in times of hardship or stress it is the junior firemen who have to take the loss rather than firemen, such as petitioners, with decades of seniority.

But the conclusive answer to the Brotherhood's "unemployment" defense of its inroad upon the mileage and pay of senior Negroes is that there is no such unemployment problem on petitioners' division of the Central of Georgia Railway. Throughout the trial of the case in the District Court in 1958, the Brotherhood complained that some of its junior white members desiring to work as firemen were unable to do so because of lack of available work; it asserted that the reduction of petitioners' mileage by the swing man, who is of course still operating on petitioners' run, is justified by the continuing need to find work for junior white firemen. But in May of 1959, while the case was pending in the Court of Appeals, counsel for petitioners learned that, far from any unemployment problem, *ten new white firemen had been hired on the Columbus Division after the trial of the case in the District Court.* This information and the source thereof, as well as the series of communications thereon in June and July of 1959 between counsel for petitioners and the railroad, was presented in a timely petition for rehearing in the Court of Appeals, which is in the record before this Court.

Clearly the railroad would not be hiring new white firemen on petitioners' division if there were unemployed junior white firemen willing and able to resume employment on the division. Indeed, under the seniority rules, the new white firemen on the division *could* not be employed while there were still junior firemen already on the roster willing and able to work. Thus the record shows the Brotherhood's attempted "unemployment" justification of its continuing inroad on the mileage of senior Negroes to be specious—new white firemen are actually being hired

on petitioners' division at the very time that the Brotherhood is here urging that unemployment among junior white firemen justifies the continuing monthly expropriation of the mileage of Negro firemen with forty years' seniority on the railroad. What we now have is not simply a case of the white Brotherhood taking work from senior Negro firemen and giving it to junior white firemen, but rather a case of its taking work from senior Negro firemen and giving it to newly-hired white firemen.

(4) Since the Brotherhood has no adequate or even direct response to the compelling issue presented by the Petition, it now suggests that this Court should refuse review because of the so-called two-court rule (Op., pp. 10-13). But reliance upon this contention is wholly misplaced for petitioners do not ask this Court to "review the evidence of record when there are concurrent findings by two courts below" (Op., p. 11); there was no resolution of conflicting evidence below for the evidence is in no sense conflicting.* On the contrary, "the District Court found and the Brotherhood conceded in that court, in the Court of Appeals and in this Court, the essential facts which show a gross violation of the *Steele* doctrine by the Brotherhood's action against petitioners. These facts are (1) that the Brotherhood without notice or hearing effected an overnight reduction in the traditional mileage and pay of the most senior Negro firemen on the Columbus Division; (2) that the swing man device by which petitioners are being reduced has not been employed by the Brotherhood against white firemen but only against Negroes and indeed there is not one demonstrable dollar of pay which any white

* In essence, what we have here is not District Court findings of fact approved by a Court of Appeals, but erroneous lower court interpretations of, and conclusions from, substantially admitted facts. The refusal of the courts below to find discrimination on these compelling and conceded facts is tantamount to a repudiation of *Steele* itself.

fireman has been caused to lose by the Brotherhood; and (3) that the overnight appropriation of the mileage and pay of the senior Negro firemen has been effected by the Brotherhood for the benefit of its own junior white members. Significantly, in this Court the Brotherhood concedes as it was forced to concede below that "any reduction of the petitioners' mileage is reasonably certain to result, at least ultimately, in the creation of jobs for unemployed *white* firemen" (Op., p. 33), and that "restrictive regulation of the firemen's mileage will likely *cause some senior Negro firemen to earn less mileage, and more jobs will become available for firemen [whites] on the lower positions on the seniority roster*" (Op. p. 7). Precisely that shift of mileage and pay from Negroes to junior whites is, of course, what has occurred in this case. It will occur increasingly in the future if this Court fails to review a decision which permits an all-white Brotherhood, without even notice or hearing and without a shadow of justification, to take the traditional pay of senior Negroes for the benefit of its junior white members.

Respectfully submitted,

JOSEPH L. RAUH, JR.,
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Washington 6, D. C.,
Attorneys for Petitioner.

JANUARY, 1960.

(8600-9)